No. (1)

Supreme Court, U.S.
FILED

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Supreme Court of The United States

October Term, 2001

JEANNE MARIE DANA,

Petitioner,

- against -

CHEMICAL BANK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appeal Press **- (914) 761-3600 (212) 267-6602 (516) 872-1110 (8829)**

73pp

QUESTIONS PRESENTED

1. Whether a multimillion-dollar bankruptcy estate, created as a matter of federal bankruptcy law, may be rendered a nullity five years after its creation, by the imposition of a state law constructive trust.

2. Whether a trial judge's cross examination style, sixty-six question interrogation of a defendant, over the objection of her counsel and the stated preference of the plaintiff's counsel that no questions be asked, should vitiate a million dollar jury verdict.

PARTIES TO SECOND CIRCUIT PROCEEDINGS

In the proceedings before the Second Circuit, the named Defendant-Appellant, Jeanne Marie Dana, as well as the named Plaintiff-Appellee, J.P. Morgan Chase, f/k/a Chase Manhattan Bank, NA, f/k/a Chemical Bank, and named Defendant-Counter-Claimant, Richard M. Coan, Trustee, Bankruptcy Estate of Connaught Properties, Inc. and named Defendant, James A. Miller, Trustee. Defendant-Appellant, Jeanne Marie Dana is the only Petitioner before this Court. The only Respondent before this Court is Chemical Bank.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeanne Marie Dana, respectfully requests that a Writ of Certiorari be issued to review the Judgments below.

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Second Circuit appear at the Appendix and are unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided my case was February 2, 2001. A timely petition for rehearing was denied by the United States Court of Appeals on May 14, 2001. A copy of the Order denying rehearing is included with this Application. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

An extension of time to file the petition for a writ of certiorari was granted to and including October 11, 2001 on August 3, 2001 in Application No. 01A101.

STATEMENT OF THE CASE

The Claim Against Dana on the Guaranty

In 1992, the Petitioner, Jeanne Marie Dana ("Dana") was sued on a personal guaranty of a bank loan made by Chemical Bank ("Chemical" or the "bank"). Jurisdiction of the District Court was founded on diversity of citizenship. Her principal defense was that the guaranty was only for a limited purpose and time, as agreed by the bank's loan officer and she. At trial, Dana's and the bank officer's testimony on this issue

were directly opposite, and it would be the jury's assessment of their credibility that would decide the case. Dana asserted on appeal before the Second Circuit that the Magistrate Judge prejudiced her case before the jury by adopting a biased attitude toward her which revealed itself in the Judge's persistent questioning of her after the bank's counsel had completed his recross-examination of Dana.

When the bank's trial counsel completed his recross examination of Dana on the last day of evidence, shortly before 4:00 p.m. (the time was referenced in the trial transcript) (A462)[1], Dana was not permitted to leave the stand by the Magistrate Judge. Instead, the Magistrate Judge proceeded to ask her some *forty-three* (43) questions. At a break at 4:05 p.m., Dana's counsel stated to the Magistrate Judge that he believed she "asked improper questions of [Dana] which showed a bias and prejudice against [his] client". (A462). Chemical's counsel essentially joined in the issue by stating (after making a pro forma gesture of disagreeing with the claim of prejudice) "[i]n fact, Your Honor, *for the record*, Chemical Bank would have preferred that Your Honor also ask no questions because I had completed my cross-examination . . . "

Notwithstanding both counsel's statements, at 4:30 p.m. (A466), the Magistrate Judge asked twenty-three (23) more questions and when Dana's counsel lodged an objection (A466), he was ignored by the Magistrate Judge. Such actions ensured that the last thing the jury would remember from the last day of evidence was Dana being examined in an adversarial manner by the judge. The Second Circuit Court of Appeals, in its Summary Order, made no comment on the substance of this questioning or the propriety of it.

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[1] Within this Petition, references to the Appendix submitted to this Court will be cited as "App. ___." References to the Appendix on file with the United States Court of Appeals for the Second Circuit in the Chemical Bank v. Dana matter will be cited as "A ___."

The Alleged Fraudulent Conveyance

In 1994, two years after filing its initial complaint against Dana only, the bank added a second count to its complaint, alleging Dana fraudulently conveyed real property to Connaught Properties, Inc. ("Connaught"). After the bank cited Connaught into the case, Connaught filed bankruptcy in 1994, having an estate of in excess of four million dollars.

The bankruptcy estate created by operation of federal bankruptcy law was administered for over five years. During that time, a trustee, Richard M. Coan (the "trustee"), was appointed, creditors were paid by order of the bankruptcy court, professional fees were approved and paid by order of the bankruptcy court and various creditors appeared in the bankruptcy case and filed claims therein. Chemical actively participated in the estate, filing a proof of claim (A321-326)[2] and a motion to dismiss the bankruptcy case which motion was denied by the bankruptcy court. (A306).

During the bankruptcy case, the trustee and Chemical agreed to have the District Court determine their claims involving the bankruptcy estate assets. In 1999, Chemical moved for summary judgment on its fraudulent conveyance claim and the trustee cross-motioned for summary judgment on the estate's various claims. In a 1999 ruling on the cross-summary judgment motions, the Magistrate Judge found in favor of Chemical and against the trustee. (App. 26a-51a) In her ruling, the Magistrate Judge imposed a constructive trust on all the funds in the bankruptcy estate in favor of Chemical, and she further held that none of the funds were property of the

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[2] References to the Appendix in this section are to the Appendix in the Chemical Bank v. Coan matter before the Second Circuit.

estate. Her ruling made the bankruptcy estate vanish as a matter of state law.

This decision was appealed to the Second Circuit, premised on a challenge to the District Court's imposition of a state law constructive trust over the trustee's strong-arm powers conferred by the Bankruptcy Code. The Second Circuit affirmed the decision. (App. 1a-10a) Dana challenged the imposition of the constructive trust in her Petition for Rehearing, but her petition was denied without comment. (App. 22a)

REASONS FOR GRANTING THE PETITION

The Second Circuit's Approval of the Imposition of a Constructive Trust Over Property Which Would Otherwise Comprise a Bankruptcy Estate Conflicts With Decisions of Other Circuits and is Fundamentally at Odds With the General Goals of the Bankruptcy Code

A Writ of Certiorari should be granted to review the Second Circuit's decision to ensure that the Circuits have this Court's guidance on the appropriateness of recognizing constructive trust claims involving debtors who have filed for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). By affirming the imposition of a constructive trust by the District Court, the Second Circuit endorsed a result which is the antithesis of goals of the Bankruptcy Code and one which has been harshly criticized by the Sixth Circuit and questioned by the Seventh Circuit.

The Second Circuit affirmed the District Court's finding that Dana fraudulently transferred the Westport property to Connaught within the meaning of Connecticut's Uniform Fraudulent Transfer Act, Conn. Gen. Stat. Ann. Section 52-522(f)(a). The Second Circuit also approved the *remedy* chosen by the District Court, which was to avoid the transfers and treat the conveyance as though it never occurred, a classic legal fiction. And, the Second Circuit upheld the District Court's holding that once th constructive trust was imposed, the property held in that trust was not considered "property" of the bankruptcy estate under 11 U.S.C. Section 541.

Such a finding made Chemical's rights to the estate property superior to the trustee's strong-arm powers and rights under 11 U.S.C. Section 544, and superior to the rights and claims of all other creditors of the suddenly non-existent bankruptcy estate. The problem with the Second Circuit dignifying this fictional result lies in its clash with reality.

This was a bankruptcy case which had, by then, been pending for five years, having an estate that started with real property valued at over four million dollars, which property was then sold pursuant to an order of the bankruptcy court and converted to cash. Approximately seventy five percent of that cash was then distributed, by order of the bankruptcy court, to creditors of Connaught other than Chemical and to administrative claimants such as attorneys who performed work in the bankruptcy case. There were remaining secured, unsecured and administrative creditors waiting to have their claims against the estate determined. To them, this fiction was an unappealing read.

To have such an estate be declared "non-existent" by the District Court's imposition of a constructive trust would seem illogical at best. At worst, such a declaration, sanctioned

by the Second Circuit, is an affront to the Bankruptcy Code's goal of an orderly distribution of assets to the various creditors of the bankrupt, as the Sixth Circuit has emphatically pointed out.

"[A] constructive trust is fundamentally at odds with the general goals of the Bankruptcy Code.'" *In re Omegas Group, Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1994), *citing with approval The Oxford Organisation, Ltd. v. Peterson (in re Stotler and Co.)*, 144 Bankr. 385, 388 (N.D. Ill. 1992). "'The reluctance of Bankruptcy Courts to impose constructive trusts without a substantial reason to do so stems from the recognition that each unsecured creditor desires to have his particular claim elevated above the others. Imposition of a constructive trust clearly thwarts the policy of ratable distribution and should not be impressed cavalierly.'" *In re Omegas Group, Inc.*, 16 F.3d 1451, *citing, The Oxford Organisation, Ltd. v. Peterson (in re Stotler and Co.)*, 144 Bankr. 388, *quoting Neochem Corp. v. Behring Int'l, Inc. (In re Behring Int'l, Inc.)*, 61 Bankr. 896, 902 (Bankr. N.D. Tex. 1986).

The Sixth Circuit, in *In re Omegas Group, Inc.*, rejected a creditor's attempt to persuade the bankruptcy court to impose the remedy of a constructive trust for alleged fraud committed against it by the debtor and thus take ahead of all other creditors and the trustee. In so holding, the Court stated:

> The equities of bankruptcy are not the equities of common law. Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor. 'Ratable distribution among all creditors' justified the Code's placement of the trustee in the position of a first-in-line judgment creditor and bona fide purchaser for value,

> empowered to avoid certain competing interests . . . so as to maximize the value of the estate. To a party defrauded by the debtor, incorporating proceeds of fraud in the debtor's estate may seem like allowing the "estate to benefit from property that the debtor did not own." *Quality Holstein Leasing*, 752 F.2d [1009], at 1013 [(5th Cir. 1985)]. But as the Seventh Circuit has pointed out, "allowing the estate to 'benefit from property that the debtor did not own' is exactly what the strong-arm powers are about: they give the trustee the status of a bona fide purchaser for value, so that the estate contains interests to which the debtor lacked good title." *Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. 1989) (criticizing *Quality Holstein Leasing*). The Code recognizes that each creditor has suffered disappointed expectations at the hand of the debtor; for this reason, it makes maximization of the estate the primary concern and entitlement to shares of the estate secondary. Imposing a constructive trust on the debtor's estate impermissibly subordinates this primary concern to a single claim of entitlement.*In re Omegas Group, Inc.*, 16 F.3d at 1452.

Making the Second Circuit's decision to elevate Chemical's claim above that of the trustee even more worthy of review by this Court is its citation to New Hampshire and Michigan cases for the proposition that "a constructive trust is thought to spring into operation at the time of the events giving rise to the duty to re-convey the property." (App. 7a), *citing Curtis Mfg. Co. v. Plasti-Clip Corp.*, 933 F.Supp. 94, 106 (D. N.H. 1995), *In re Atlantic Mortgage Corp.*, 69 B.R. 321, 330 (Bankr. E.D. Mich. 1987). The Second Circuit used these

citations to bolster its holding that because the constructive trust came into being prior to Connaught's bankruptcy filing, Chemical's beneficiary interest was prior in time and superior to the trustee's.

Putting aside the appropriateness of basing bankruptcy claims on a constructive trust theory, the timing of when the constructive trust is thought to arise can be crucial to determining whether a creditor achieves superiority over a bankruptcy trustee. According to the *In re Omegas Group, Inc.* Court, the problem with the analysis of other circuit courts "which have addressed bankruptcy claims based on constructive trust, is that a constructive trust is not really a trust. A constructive trust is a legal fiction, a common-law *remedy* in equity that may only exist by the grace of judicial action." *In re Omegas Group, Inc.*, 16 F.3d at 1449 (emphasis added). The Court quoted a leading commentator on the subject:The constructive trust remedy developed in equity, by analogy to the express trust arrangements in which one person holds legal title to property for the benefit of another. The same concept of separate legal and beneficial interests in property suggested a remedy for unjust enrichment; if, under principles of unjust enrichment, the defendant holds title to property that ought to belong to the plaintiff, the court will treat the defendant as a trustee, holding tile for the plaintiff's benefit. At that point, however, the analogy to an express trust ends. The result of a constructive trust is a judicial decree ordering the defendant to convey the property to the plaintiff . . . A constructive trust is merely a means by which the court can say that the defendant must relinquish to the plaintiff property that represents unjust enrichment. *In re Omegas Group, Inc.*, 16 F.3d at 1449, *quoting* Emily L. Sherwin, "Constructive Trusts in Bankruptcy," 1989 U. Ill. L. Rev. 297, 301 (1989).

What the Sixth Circuit Court is saying is that a constructive trust is a remedy that doesn't come into existence unless and until a court order imposes one. Since Connaught filed bankruptcy (and a trustee was appointed) five years prior to the District Court imposing the constructive trust, if this case were decided by the Sixth Circuit, it is abundantly clear that Chemical's claim would have been subordinate to the claim ofthe trustee and Chemical would have been treated no differently than other creditor of the bankruptcy estate.

The Second Circuit's citation to New Hampshire and Michigan cases for the proposition that constructive trusts arise, not when a court imposes one, but when the duty to re-convey arises should be reviewed, not only under the general law of trusts identified by the Sixth Circuit, but under the law of the State of Connecticut which is the common law applicable to this case. *See, e.g., Butner v. United States,* 440 U.S. 48, 54 (1979) (existence of parties' property rights in bankruptcy depends on state law).

The case law in Connecticut on constructive trusts makes it clear that the "imposition of a constructive trust by equity is a *remedial* device designed to prevent unjust enrichment. [internal citations omitted]. One holding title to property upon which a constructive trust is imposed is not compelled to re-convey the property because he is a constructive trustee; it is because *he can be compelled* to convey title to the property that he is a constructive trustee." *Cohen v. Cohen*, 182 Conn. 193, 203, 438 A.2d 55, 60 (1980) (emphasis added). Thus, Connecticut's highest court lines up squarely under the Sixth Circuit's analysis that a constructive trust is a *remedy*, only arising when a court imposes one and not before (i.e., the recipient of the transferred property isn't a constructive trustee at the time he or she receives the property, he or she is only a constructive trustee when a court imposes the trust).

This Court should grant certiorari to resolve the conflict between the Circuits concerning constructive trust claims in bankruptcy. The guidance of this Court is needed to ensure that the goals of the Bankruptcy Code do not become subservient to state law theories of constructive trust. As the *In re Omegas Group, Inc.* Court pointed out, "'while the nature and extent of the debtor's interest are determined by state law once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate.'" *In re Omegas Group, Inc.*, 16 F.3d at 1450, *citing Baverly v. IRS (in re Terwillinger's Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990) (*quoting N.S. Garrott & Sons v. Union Planters Nat'l Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 466 (8th Cir. 1985).

The Second Circuit's Affirmance of the Judgment Notwithstanding the Actions of the Trial Judge Sanctions a Departure From the Accepted and Usual Course of Judicial Proceedings Which Threatens the Public's Confidence in the Judiciary

Dana submits that by affirming the judgment of the District Court and rejecting her claim of prejudice as a result of the conduct of the Trial Judge, the Second Circuit sanctioned a departure from the accepted and usual course of judicial proceedings in such a way as to threaten the public's confidence in the impartiality of courts. Federal courts have stated that "'a court should strive for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding.'" *Rivas v. Brattesani*, 94 F.3d 802, 807 (2d Cir. 1996), *citing Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Circ. 1996). The Magistrate Judge in this case was not asking questions to "'clarify both legal and factual issues and thus minimize possible confusion in the jurors' minds'", *Rivas v. Brattesani*, 94 F.3d at 807, *citing Care Travel*

Co., Ltd. v. Pan Am. World Airways, Inc., 944 F.2d 983, 991 (2d Cir. 1991).

Instead, she questioned, re-questioned and attempted to weaken Dana's claims in the eyes of the jury even though Chemical's own counsel, in his own words, suggested to the judge that the bank would have preferred that she ask no questions because he had completed his cross-examination. Perhaps what counsel for the bank was intimating was that the judge was crossing the line and imperiling the case by creating a record showing her bias against Dana.

The cross-examination by the bank's attorney must not have been sufficient in the Magistrate Judge's view, so she took it upon herself to cross-examine Dana. When she did so, she ran afoul of federal courts' observations that:

> While a trial judge may understandably become impatient with counsel's examination of a witness, either because of its ineptness, lack of clarity or organization, or for some other reason, the judge must exercise self-restraint in his interference lest "clarification" only create more confusion or *the impression in the juror's minds that the judge is hostile to one party's position.*

Rivas v. Brattesani, 94 F.3d at 807, *citing Anderson v. Great Lakes Dredge & Dock Co.*, 509 F.2d 1119, 1131 (2d Cir. 1974) (emphasis in the original). A review of her questioning of Dana doesn't reveal a judge looking for clarification; it reveals a prosecutorial cross-examination. A sampling of her questions on the limitation issue is revealing on this point. The context of her questioning is important. Dana had previously

testified, in her direct testimony, that it was the bank that required a guarantee from her and it was the bank that represented to her that the guaranty would only be in force until such time as a title defect in the mortgaged leasehold was remedied. The Magistrate Judge, after Dana testified in rebuttal to the bank's witnesses, and long after her direct testimony and cross examination by the bank's attorney, asked the following series of questions:

1. What was the earliest date of that when *you* told Chemical Bank that the guarantee was a limited guarantee and not a continuing one?
2. When was the first date on which *you* advised someone from Chemical Bank, after the closing, that this guarantee was of limited duration?
3. After November 4th, when is the first day on which *you* advised or the first occasion on which *you* advised someone from Chemical Bank that although there was a guarantee that seemed, by its terms, to be a continuing one, it was, in fact, limited by the terms of the trust?
4. When was that?
5. What particular documents were involved?
6. To whom did *you* communicate, at Chemical Bank, that the guarantee was of a limited duration?
7. Did you communicate with them in person or in writing?
8. Was that individually or in a conference call?
9. Which lawyer's office?
10. Did anyone, on your behalf, communicate this to Chemical Bank?
11. Did you ask any lawyer to communicate this to Chemical Bank, on your behalf?
12. Did you, at any time, between November 4th of 1986 and 1990 advise Chemical Bank, in writing, that the guarantee was of a limited duration?

13. Did you do that in writing?

(A461-462) The Magistrate Judge clearly indicated to the jury, by these questions, that she didn't believe Dana's direct testimony that it was the bank that required the guaranty and it was the bank which represented to her that it was to be of a limited duration. Moreover, thirteen (13) questions in rapid fire, cross-examining style, hardly supports the notion that the judge was looking for clarification of facts.

This Court should grant certiorari because of the Second Circuit's sanctioning of the District Court's departure from the accepted and usual course of judicial proceedings. To let the affirmance of the Second Circuit stand would be to sanction such judicial behavior and undermine the public's confidence in a system that must have, at its core, the impartiality of the presiding judge.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square in the City of New York, on the 2nd day of February, two thousand one.

PRESENT:

HON. JAMES L. OAKES,
HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER

Circuit Judges.

CHEMICAL BANK,

Plaintiff-Counter-Defendant-Appellee,

SUMMARY ORDER
No. 99-7427

RICHARD M. COAN, TRUSTEE,
BANKRUPTCY ESTATE OF CONNAUGHT
PROPERTIES, INC,

Trustee-Appellant.

Appearing for Appellant:

Timothy D. Miltenberger, Coan, Lewendon, Royston & Gulliver, LLC, New Haven CT

Appearing for Appellee:

Steven M. Frederick, Wofsey, Rosen, Kweskin & Kuriansky, Stamford, CT.

Appeal from the United States District Court for the District of Connecticut (Holly B. Fitzsimmons, Magistrate Judge)

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment of the District Court is hereby AFFIRMED

Appellant Richard Coan trustee of the bankruptcy estate of Connaught Properties ("Connaught") appeals from a final judgment of the United States District Court for the District of Connecticut (Holly B. Fitzsimmons, *Magistrate Judge)* granting Chemical Bank's motion for summary judgment. This case has a complicated history, familiarity with which is presumed, arising out of Chemical Bank's quest to collect on a personal guaranty executed by Jeanne-Marie Dana (see *Chemical Bank v. Dana.* No. 99-7524 (2d Cir. 2001).

Chemical Bank filed this action on June 11, 1992 seeking to collect an the guaranty. Because prior legal proceedings against Dana did not enable Chemical to recover the full amount due on the note, Chemical also sought a prejudgment attachment an property Dana owned in Westport, Connecticut. On June 30, 1992, the District Court (Jose A. Cabranes, *Judge*), upon a finding of probable cause, awarded Chemical a prejudgment attachment on the property. After the District Court removed a prior injunction on July 17, 1992, Dana conveyed the Westport property to Connaught for no consideration by a quitclaim deed. The District Court (Holly B. Fitzsimmons, *Magistrate Judge*) found that before she conveyed the property Dana was on notice that Chemical would seek an upward modification of the first attachment to secure the interest that was accruing on her debt to Chemical. On July 18, 1994, Miller, the prior trustee for the Connaught bankruptcy estate, granted a

mortgage in favor of Penderyn, Ltd. in the amount of $380,000. On August 12, 1994, the District Court granted Chemical's motion for a second attachment on the Westport property to account for the interest of approximately $114,000 that had accrued on Dana's debt since the filing of the first attachment. On September 12, 1994 Chemical filed its third amended complaint adding Connaught as a defendant and an allegation that Dana had fraudulently conveyed as defined under Connecticut law, the Westport property to Connaught.

On September 23, 1994, Connaught filed for reorganization under the Bankruptcy Code, 11 U.S.C. § 301 (1993). The Westport property was sold with the approval of the Bankruptcy Court and the trustee indicated to the District Court that "the Bankruptcy Estate has satisfied all valid encumbrances senior in right to the First Attachment [the June attachment]. The District Court severed the trial, which then proceeded against Dana alone. The remaining action against Coan was resolved by the District court's order granting Chemical's motion for summary judgment as to the fraudulent conveyance claim, granting its motion to recover on its second attachment, and denying Coan's cross-motion in opposition. Finding that Dana fraudulently conveyed the Westport property to Connaught, the District Court avoided the transfer.

On Appeal, Coan contends that the District Court erroneously found that the Westport property was impressed with a constructive trust and that, even if that ruling were correct, the trustee's claims to the proceeds of the sale of the property should be superior to Chemical's.

1. Imposition of Constructive Trust.[1]

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[1] The parties disagreed as to whether the proper standard of review for imposition of a constructive trust was *de novo* or abuse of discretion. We need not reach that issue here, however, as under either standard the

In its ruling on the cross-motions for summary judgment, the District Court found that Dana fraudulently transferred the Westport Property to Connaught within the meaning of Connecticut's Uniform Fraudulent Transfer Act, Conn. Gen. Stat. Ann. §52-552f(a) (West Supp. 2000).[2] As a remedy, the District Court avoided the fraudulent transfer pursuant to Conn. Gen Stat. Ann §52-552h(a)(1) (West Supp. 2000), treating the conveyance as though it never occurred. Although not disagreeing that this was a fraudulent conveyance, Coan challenges the district Court's decision to impose a constructive trust where, he claims, the "record herein reveals that Connaught engaged in no wrongful or unconscionable conduct and was not unjustly enriched."Coan also argues that because Chemical allegedly failed to record its first attachment properly, it cannot now correct that failure through the imposition of a constructive trust.

Coan, however, ignores the fact that avoiding the transfer and impressing a constructive trust on the transferee is a remedy specifically provided for by statute. *See* Conn. Gen Stat. Ann. §52-552(h)(West. Supp. 2000); *see also in re M & L Bus. Mach. Co.*, 59 F.3d 1078. 1081 (10th Cir. 1995) (recipient of property obtained by fraud "does not actually acquire title to it").

Murphy v. Dantowitz, 114 A.2d. 194, 197 (Conn.

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constructive trust was properly imposed.

[2] The statute provides that a "transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made...if the debt made the transfer...without receiving a reasonably equivalent value in the exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer."The District Court found that Chemical's claim arose before the transfer, that Connaught paid no consideration for the transfer, and that Dana was insolvent at the time of the transfer.

1955) (under Connecticut common law, "[p]roperty fraudulently conveyed may, as to the creditors of the grantor, be treated as if no conveyance of it had been made, if proper legal proceedings are taken to appropriate it to the satisfaction of the grantor's debts."); *Wendell Corp Tr v. Thurston*, 680 A.2d 1314, 1318 (Conn. App. 1996) (one remedy for fraudulent conveyance is imposition of constructive trust). Coan also ignores the findings adopted by the District Court, and not challenged here, that Dana owns and controls Connaught, and that Dana transferred the property after she was on notice by the court that Chemical would seek an upward modification of the first attachment. Coan, therefore, has failed to demonstrate that the District Court's decision should be overturned.

2. The Perfection of the First Attachment

Rather than filing an attachment order signed by a sheriff, as required by statute, Chemical filed the attachment order signed by Judge Cabranes. The District Court rejected a motion for reconsideration by Dana arguing the attachment was therefore void, noting that the attachment would at most be voidable at the instance of any other creditor or bona fide purchaser and Dana failed to qualify as either. In its motion for summary judgement, Coan asserted a similar argument. The District Court rejected it applying the law of the case. Regardless, of whether law of the case applies in this instance, the attachment filed was sufficient under Connecticut law to provide constructive notice of the attachment. Under Connecticut law, a court will invalidate a voidable attachment only when the defects are material or consequential. *See Beers v. Westport Bank and Trust Co.* 50 Conn. App. 671, *cert denied*, 247 Conn. 940 (1998) (noting that the procedural protection requiring a finding of probable cause before attachment lessened the need for strict compliance with the statute; although the attachment listed the incorrect court to which it was returnable, it provided sufficient notice of the attachment); *Joseph v. Donovan*, 157

A. 638, 639 (Conn. 1931) (holding that the defect, listing the wrong court from which the attachment was issued, was too inconsequential to merit invalidating the attachment); *cf. Connecticut Nat'l Bank v. Lorenzato*, 602 A.2d 959, 962 (Conn. 1992) (imperfectly recorded deed affords constructive notice to subsequent third party creditors to the extent that the mortgage contains sufficient information to put a title searcher on inquiry). The attachment filed here clearly indicated the property to be attached, the amount of the attachment, the name of the defendant property owner, and the court from which the attachment order issued. Thus, because the first attachment is valid, Chemical's interest in the Westport property has priority over the bankruptcy trustee, *see In re Euro-Swiss Int'l Corp.*, 33 B.R. 872, 881 (Bankr. S.D.N.Y. 1983) ("Congress did not intend to shield the Trustee under § 54(a)(3) from the effect of constructive notice."), as Coan implicitly concedes in his brief.

3. Priority of Interests in the Proceeds of the Westport Property Coan next claims that under his strong-arm powers, 11 U.S.C. § 544 (1993),[3] a

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[3] Section 544 provides,

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be

bankruptcy trustee may avoid a constructive trust claim if a bona fide purchaser has priority over such a claim.[4]

Once a constructive trust is imposed, the property held in trust is not considered "property" of the bankruptcy estate. *See In re Koreag Controle et Revision S.A.*, 961 F.2d 341, 352 (2d Cir. 1992) ("A constructive trust, therefore, confers on the true owner of the property an equitable interest in the property superior to the trustee's") (internal quotation marks and citation omitted); *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989); *see also Begier v. Internal Rev. Serv.*, 496 U.S. 53, 59 (1990). Further, a constructive trust is thought to spring into operation at the time of the events giving rise to the duty to reconvey the property. *See Curtis Mfg Co. v. Plasti-Clip Corp.*, 933 F. Supp. 94, 106 (D. N.H. 1995); *In re Atlantic Mortgage Corp.*, 69 B.R. 321, 330 (Bankr. E.D. Mich. 1987); *Murphy*, 114 A.2d at 197. Therefore, the District Court Correctly found that Chemical's rights are superior to those of the trustee.

4. Chemical's Second Attachment was not a Preference under 11 U.S.C. § 547.

The District Court correctly held that Chemical's

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perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

[4] On the bankruptcy petition date (when the trustee's bona fide purchaser status arose), Coan claimed to not have constructive notice of Chemical's claims to a constructive trust Chemical's third amended complaint, alleging fraudulent conveyance and adding Connaught as a defendant was filed on September 12, 1994, before the filing of the bankruptcy petition. A common remedy for a fraudulent conveyance, and the remedy Chemical requested, is to avoid the transfer. Thus, Coan may be deemed to have had constructive notice of Chemical's claims.

second attachment on the Westport property was not a preference under 11 U.S.C. § 547 (1993).[5] First, the attachment related only to Dana's interest, not Connaught's. Second, because the District Court correctly found that Dana had fraudulently conveyed the property to Connaught and avoided the transfer, thereby imposing a constructive trust, the bare legal title Connaught held is not considered "property" of the bankruptcy estate as discussed above.

5. Chemical's Second Attachment is superior to the Trustee's Penderyn Mortgage.

Coan lastly argues that even if the first attachment is valid, the trustee is entitled to a distribution representing the value of the Penderyn mortgage before the distribution of the second attachment to Chemical. The Penderyn mortgage occurred before Chemical initiated its fraudulent conveyance claim and before Chemical obtained the second attachment. Although the trustee avoided the Penderyn mortgage, it still exists as a valid encumbrance for the benefit of the bankruptcy estate. *See* 11 U.S.C. § 551 (1993). The District Court ruled that it declined "to find that the Trustee, after avoiding the mortgage under section (547(b), can now use the existence of that mortgage to benefit the Connaught Bankruptcy Estate."

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[5] Section 547(b) states in relevant part:

the trustee may avoid any transfer of an interest of the debtor property --

(2) to or for the benefit of a creditor,

(3) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(4) made while the debtor was insolvent;

(5) made...

(B) on or within 90 days before the date of the filing of the petition...

and

(5) that enables such creditor to receive more than such creditor would receive if--

(B) the transfer had not been made...

Coan argues that the District Court ignored the specific mandate of the Connecticut Uniform Fraudulent Transfer Act as applied to a good-faith transferee, to whom, as the bankruptcy trustee, he is equivalent pursuant to 11 U.S.C. § 544(a)(3). *See* Conn. Gen. Stat. Ann. § 52-521(d) (West Supp. 2000) ("Notwithstanding the voidability of a transfer or an obligation under sections 52-552a to 52-552l, inclusive, a good-faith transferee...is entitled, to the extent of the value given the debtor for the transfer..., to (1) a lien on or a right to retain any interest in the asset transferred; (2) enforcement of any obligation incurred; or (3) a reduction in the amount of the liability on the judgment."). Because Chemical could not recover directly against Penderyn under Connecticut law, Coan argues, it may not do so indirectly. *See in re Gary James Preston,* 76 B.R. 654, 659 (Bankr. C.D. Ill. 1987) ("If a mechanic's lien claimant cannot directly recover from a bona fide transferee, he should not be able to indirectly recover by claiming the proceeds of the trustee's successful preference action.").

Chemical correctly responds that because Connaught possessed only bare legal title in the Westport property, it is not properly part of the bankruptcy estate. *See* 11 U.S.C. § 551 (1993) ("[a]ny transfer avoided under section...547...of this title...is preserved for the benefit of the estate but only with respect to property of the estate."). Regardless of the interest of the Penderyn mortgage under state law, the trustee cannot assert that interest against property that is not part of the bankruptcy estate. *See, e.g. In re Mark Benskin & Co.*, 161 B.R. 644, 655 (Bankr. W.D. Tenn. 1993) ("if a perpetuated trust res did exist in [the intervening creditor's] favor, the justification could not be made, as the trust property would never have become property of the bankruptcy estate"); *see also* 1245 Cong. Rec. H. 11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6458 ("The section is clarified to indicate that a transfer avoided or a lien that is

void is preserved for the benefit of the estate, but only with respect to property of the estate. This prevents the trustee from asserting an avoided tax lien against after acquired property of the debtor.").

For the reasons stated above, we AFFIRM judgment of the District Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

s/ Lucille Carr 2/2/01

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square,in the City of New York on the 2nd day of February two thousand one.

PRESENT:

HON, JAMES L. OAKES,
HON. CHESTER I. STRAUB,
HON. ROSEMARY S. POOLER,

Circuit Judges.

CHEMICAL BANK,

Plaintiff-Counter-Defendant-Appellee,

SUMMARY ORDER
No. 99-7524

v.

JEANNE MARIE DANA, also known as Ashton Sloane, also known as Patricia Delafield, also known as J. Martin Dana also known as Jeanne Peters,

Defendant-Counter-Claimant-Appellant.

Appearing for Appellant: Jeffrey E. Glen, DeForest & Duer, New York, NY.

Appearing for Appellee: Steven M. Frederick, Wofsey, Rosen, Kweskin & Kuriansky, Stamford, CT.

Appeal from the United States District Court for the District of Connecticut (Holly B. Fitzsimmons, *Magistrate Judge).*

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS, HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Defendant-appellant Jeanne Marie Dana appeals from a verdict after a jury trial conducted before the United States District Court for the District of Connecticut (Holly B. Fitzsimmons, *Magistrate Judge)* awarding Chemical Bank ("Chemical") approximately $ 1.5 million dollars in its action seeking recovery on a personal guaranty Dana executed.

Chemical Bank filed this action on June 11, 1992 against Dana on a personal guaranty she executed, seeking payment of all of the liabilities of Streets Ahead, a corporation formed by Dana for the sole purpose of leasing property in London. In addition to Streets Ahead's promissory note, Chemical had required a personal guaranty from Dana to fund Streets Ahead's acquisition of the London property. In the guaranty, Dana agreed to guarantee "absolutely and unconditionally, to the Bank the payment of all liabilities of [Streets Ahead] to the Bank of whatever nature,whether now existing or hereafter incurred..," Streets Ahead defaulted on its obligation to Chemical; Chemical notified Dana that it intended to hold her liable under the guaranty and that it was commencing legal proceedings in England to collect amounts due. After various proceedings in England, the details of which will not be summarized here, Chemical became the absolute owner of the leasehold interest in the London property but the underlying debt of Streets Ahead and Dana's liability under the guaranty were not extinguished.

Because these various legal proceedings in England did not enable Chemical to recover the full amount due,

Chemical also sought a prejudgment attachment on property Dana owned in Westport, Connecticut in the United States District Court for the District of Connecticut (Jose A. Cabranes, *Judge)*

On June 30, 1992, the District Court, upon a finding of probable cause, awarded Chemical a prejudgment attachment an the property. After the District Court removed a prior injunction prohibiting Dana from transferring the property without a court order, Dana conveyed the Westport property to Connaught properties, Inc., a company Dana owned and controlled, for no consideration by a quitclaim deed. The District Court (Holly B. Fitzsimmons, *Magistrate Judge)* later found that before she conveyed the property, Dana was on notice that Chemical would seek an upward modification of the first attachment to secure the interest that was accruing on her debt to Chemical. On August 12, 1994, the District Court granted Chemical's motion for a second attachment on the Westport property to account for interest of approximately $114,000 that had accrued. On September 12, 1994 Chemical filed its third amended complaint adding Connaught as a defendant and an allegation that Dana had fraudulently conveyed, as defined under Connecticut law, the Westport property to Connaught.

On September 23, 1994, Connaught filed for reorganization under the Bankruptcy Code, 11 U.S.C. § 301 (1993). The instant case went to trial before a jury on March 1, 1996. At that time, Connaught was unable to proceed due to a conflict of interest involving its counsel. Judge Fitzsimmons severed the trial, with the trial proceeding solely against Dana. Chemical won at trial with a resulting entry of judgment against Dana for approximately $1.5 million. The remaining action against Coan, the trustee of Connaught's bankruptcy estate, was resolved by the District Court's order granting Chemical's motion for summary judgment as to the fraudulent conveyance claim, granting its

motion to recover on its second attachment, and denying Coan's cross-motion in opposition. Dana now appeals, raising several contentions, each of which we address in turn.

1. Chemical's Alleged Failings of Proof

Dana first claims that, as a matter of law, Chemical could not recover against her because it never produced the original amended promissory note entered into by Streets Ahead nor proved that it actually owned the note as required under New York's Uniform Commercial Code § 3-804 (1991).[1] This contention is without merit. First, Chemical sued her on the guaranty she executed and produced an original copy of that guaranty at trial. *See* Third Am. Compl. ¶¶ 6-14. Second, to the extent that Chemical needed to prove the underlying monetary obligation to the guaranty, it produced the original promissory note (the amended note revealed no substantive changes from the initial note) and ample testimony from a bank representative regarding the loan to Streets Ahead, the promissory notes (original and amended), Dana's personal guaranty, and evidence of both Streets Ahead's and Dana's defaults on their obligations.

2. Effect of English Proceedings on Chemical's Current

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[1] N.Y.U.C.C. § 3-804 (1991) provides in relevant part:
The owner of an instrument which is lost... may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court shall require security... indemnifying the defendant... against loss, including costs and expenses, by reason of further claims on the instrument....

Claim.

Second, Dana argues that because Chemical instituted a "Possession action" against Streets Ahead that resulted in what Dana labels a "foreclosure," it is not permitted under New York law to later sue on the promissory note without requesting permission of the first court involved. Chemical responds that it never participated in a foreclosure action in London, but rather participated in a possession action and a forfeiture action.[2] Because the property at issue is located in London and not New York, Dana's reliance on New York law is unavailing. See *Provident Sav. Bank & Trust Co. v. Steinmetz*, 270 N.Y. 129, 132 (1936) (predecessor statute to N.Y. Real Property Actions & Proceedings ("RPAPL") § 1371 applies only to mortgaged property located in New York); *Lombardo v. Fielding*, 639 N.Y.S.2d 483 (2d Dep't 1996) (requirement under RPRAPL § 1371 to obtain deficiency judgment in foreclosure action applies only to mortgages secured by property located in New York); *Chase Manhattan Bank, N.A v. Reale*, 92 civ. 1042 (JSM), 1992 WL 297576, at *4 (S.D.N.Y. Oct. 1, 1992) (rejecting argument that the failure to elect remedies during foreclosure proceeding on Connecticut property precluded subsequent deficiency judgment in New York).

New York's merger doctrine, which extinguishes a mortgage when a fee and a lesser estate, like a mortgage, are in the same person at the same time, is also inapplicable. Dana failed to dispute Chemical's statement of material facts that the "Order of Possession entered by the English Court did not serve to extinguish either Streets underlying debt on

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[2] According to English law, in a possession action, a mortgagee seeks a court order permitting it to exercise its right to re-possess and sell the mortgaged property following a breach by the mortgagor. An order for possession does not preclude an action for a deficiency judgment based on the mortgagor's outstanding indebtedness.

the mortgage, or Dana's liability on the personal guaranty," and may not do so on appeal. *See United States v. 143-14 7 E. 23rd St.*, 77 F.3d 648, 658 (2d Cir. 1996). Moreover, merger is a disfavored concept and if it appears to be against the interest of the party acquiring both estates to have a merger occur, then equity will presume that the party intended that there should not be a merger. See *Evans Prod. Co. v. Decker*, 383 N.Y.S.2d 457, 460 (3d Dep't 1976). The guaranty expressly provides that Dana "absolutely and unconditionally" guarantees the payment of all liabilities of whatever nature. Thus, both as a matter of contract language, and under *Decker*, Dana cannot avoid her obligation under the guaranty by arguing merger.[3]

3. Prejudgment Attachment Hearing

Dana next asserts that the District Court's decision to continue with the attachment hearing violated her due process rights when, despite having requested the presence of counsel. Dana was not actually represented by counsel at the hearing.

At the hearing, Dana was brought in from a local correctional facility, in which the District Court had placed her for contempt in a different action, and she stated "As I said, I haven't seen these [motion for attachment] papers. I haven't had the opportunity to discuss the matter with an

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[3] To the extent that Dana attempts to show prejudice because she was not personally included as a defendant in the possession action, she ignores the fact that she failed to dispute Chemical's assertions that she was an active participant in both the possession and forfeiture actions at summary judgment as the sole shareholder in Streets Ahead. She also fails to challenge the District Court's conclusion that she should be deemed to be in privity with Streets Ahead and therefore be deemed to have notice of the proceedings.

attorney. And until such time as I am able to discuss it with an attorney, I'm requesting that this matter be adjourned. I can't defend myself." Counsel for Chemical informed the District Court that Dana had been served with the motion papers an June 17, 1992 and that he had received a phone call from Dana on that date informing him of her attorney, James Miller, Chemical's counsel sent Miller a copy of the relevant papers. Miller attended the first attachment hearing but declined, for reasons not apparent in the record, to make an appearance. Dana admitted that she had received notice of the hearing. Chemical also admitted a copy of a bankruptcy petition that Dana had filed listing her indebtedness. Dana explained that although she had listed all the guarantees she had made in the past, including the guarantee to Chemical, she denied that she owned Chemical this money. Chemical acknowledged her desire for counsel but "submit[ted] to the Court that the need for security in this instance, as reflected in this Court's order in the Banque Paribas matter which is recorded in the Westport land records, suggests that the plaintiff may be in some peril if the property is not attached. " The District Court found the requisite probable cause for granting the attachment, arranged for Dana to have better access to counsel, and noted that he was "intimating no view on the ultimate merits of the plaintiffs claim against you. And I also emphasize the fact that upon application by you, or an attorney representing you, I am prepared to hold a hearing promptly within days of a request where this whole matter can be effectively reopened and any evidence can be taken and, if necessary, the Court would modify or vacate the attachment order which it is entering today." There was no present danger of Dana's transferring this property to avoid creditors such as Chemical, however, because the District Court had enjoined her from doing so on June 11, 1992, approximately two weeks prior to the attachment hearing.

Preliminary, we note that in her motion to dismiss the

prejudgment attachment, Dana did not claim that probable cause did not exit for the issuance of the attachment. On appeal, Dana offers two challenges to what occurred below: first, she asserts that the District Court's decision to deny a continuance and to proceed with the attachment hearing violated her due process rights and second, the District Court's decision to grant an attachment was erroneous because no exigent circumstances existed.

As to the first contention the decision to deny a continuance rests within the sound discretion of the trial court and will only be overturned for an abuse of discretion. *See Ungar v. Sarafite,* 376 U.S. 575, 589 (1964) ("it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel"); *Bergesen v. Lindholm,* 760 F. Supp. 976, 985 (D. Conn. 1991) (no violation of due process when defendants had adequate pre-deprivation notice and a meaningful opportunity to be heard but did not avail themselves fully of that opportunity); *Rex Investigative and Patrol Agency Inc. v. Collura,* 329 F. Supp. 696, 699 (E.D.N.Y. 1971) ("plaintiff misconceives the concept of due process [; plaintiff] ... confuses the right to be represented by counsel, which is inherent in due process, with the necessity of being represented by counsel, which is not."). The District Court did not exceed its allowable discretion here. The District Court already had granted one continuance, Dana had ample notice of the proceeding, and had contacted an attorney. Further, she offered her explanation of why the guaranty was listed in her bankruptcy petition and denied that she owed Chemical any money.

As to her second contention, the District Court did not need to find exigent circumstances to grant the attachment in a dispute between a creditor and a debtor in addition to finding probable cause that Chemical would succeed on the merits. *See Shaumyan v. O'Neill,* 987 F.2d 122, 127 (2d Cir. 1993) (upholding Connecticut prejudgment

attachment statute as applied even though it permitted *ex parte* attachment without the posting of a security bond because, in a creditor-debtor relationship when the debt is easily documented, there is no substantial risk of erroneous deprivation). Here, Chemical and Dana had a creditor-debtor relationship. Chemical documented that Dana personally guaranteed the debt, and that she was deficient in her payments. Despite proceeding without affording Dana counsel, the District Court did not err in granting the prejudgment attachment.

4. Evidentiary Objections and the District Court's Questioning of Witnesses

Finally, Dana raises various objections to Magistrate Judge Fitzsimmons's evidentiary ruling and trial practices. Dana failed to object at trial to the majority of the alleged errors she now asserts on appeal, and thus, has waived them. Neither has she demonstrated that those rulings affected her substantial rights. Of her remaining objections, we find that the Magistrate Judge did not demonstrate bias toward Dana, either by allegedly mocking her or inappropriately questioning witnesses. The passage Dana quotes does not indicate that the Magistrate Judge treated Dana as "the butt of her humor" but only that the Magistrate Judge sought to clarify the question counsel posed whether Dana wanted to change anything on her petition now or whether she had wanted to change anything on her petition when it was filed. The laughter mentioned on the transcript is not attributed to any specific person and reading the passage in context does not reveal that the Magistrate Judge attempted to create humor at Dana's expense.

The questions by Magistrate Judge Fitzsimmons, on which Dana focuses, are scattered throughout almost 200 pages of transcript. Dana failed to object to all of these occurrences except for the Magistrate Judge's extensive

questioning of Dana. Dana's counsel requested that a limiting instruction be given to the jury to assure the jury that the court had "no interest in one side or other, has no opinion and does not know anything and, clearly asked questions to try to assist the Jury." In her jury charge, the Magistrate Judge gave a curative instruction substantially similar to the one requested.[4] Magistrate Judge Fitzsimmons's curative instruction was more than sufficient to overcome any potential prejudice arising from her questioning of Dana. See *United States v. Vega,* 589 F.2d 1147, 1153 (2d Cir. 1978) (curative instruction instructing that jurors should not take court's questioning to indicate an opinion overcame any potential error); *United States v. Berardelli,* 565 F.2d 24, 30 (2d Cir. 1977) (curative instruction to jury telling jury that court expressed no opinion as to the defendant's guilt or innocence and to ignore any indications to contrary sufficient to overcome any potential prejudice arising from courts questioning of witness), *rejected on other grounds by United States v. Apfelbaum,* 445 U.S.115 (1980); *United States v.*

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[4] Magistrate Judge Fitzsimmons instructed the jury as follows:

Statements, arguments and characterizations of counsel, however, including those made in the form of a question to a witness and including questions asked by me are not evidence in the case and should not be considered by you in your deliberations ...

Upon allowing testimony or other evidence to be introduced over the objection of one of the lawyers or on the occasions when I have asked questions of the witnesses, the Court has not indicated nor have I meant to indicate any opinion about the weight or effect of such testimony or evidence nor should you consider the number of questions I have asked a particular witness or the fact that I did not ask questions of some witnesses to have any significance, whatsoever....

You must not infer from anything I have said or done, in this trial, that I have made a judgment about the merits of the claims being made by either side I have no opinion about the merit of any testimony. if I did, I would be encroaching upon your job and that, I will not do.

Natale, 526 F.2d 1160, 1170 (2d Cir. 1975) (no error from judge's allegedly hostile line of questioning where questions were "well within [the court's] active responsibility to assure that the issues were clearly presented to the jury").

We have considered all of Dana's remaining contentions on appeal and find them to be without merit. For the reasons stated above, we AFFIRM the judgment below.

FOR THE COURT:
ROSEANN B. MACKECHNIE,CLERK, CLERK

By: s/ Lucille Carr 2/2/01

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourteenth day of May two thousand one.

Chemical Bank,

Appellee,

Dkt No. 99-7524
99-7427

Dana,

Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein the appellant JEANNE MARIE DANA.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

by: s/Beth J. Meador
Administrative Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEMICAL BANK

CIVIL NO. 5:92cvO341 (HBF)

v.

JEANNE MARIE DANA, et al

JUDGMENT

This cause came on for consideration on the cross motions for summary judgment before the Honorable Holly B. Fitzsimmons, United States Magistrate Judge, and

The Court having considered the motions and all the papers submitted in connection therewith filed its Ruling on Cross Motions for Summary Judgment granting Chemical's motion for summary judgment and denying the Trustee's motion,

It is therefore **ORDERED** and **ADJUDGED** that summary judgment be and is hereby entered in favor of the plaintiff, in accordance with the Court's ruling.

Dated at Bridgeport, Connecticut this 31st day of March, 1999.

KEVIN F. ROWE, Clerk

By s/Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEMICAL BANK,	) CIVIL ACTION NO.
Plaintiff,	) 5:92-cv-341 (HBF)
	)
v.	)
	)
JEANNE MARIE DANA, ET Al.	)
Defendants.	)

JUDGMENT

This action came on for trial before a jury and the Honorable Holly B. Fitzsimmons, United States Magistrate Judge, and the issues having been duly tried and a jury having rendered a verdict in favor of the plaintiff and against defendant Jeanne Marie Dana in the amount of $944,094.54, and interest from March 20, 1996 to April 25, 1997 having accrued thereon in the amount of $58,297.38, and the Court having granted the plaintiff's Motion for Attorneys' Fees and Costs in the amount of $449,559.43,

It is therefore ORDERED and ADJUDGED that judgment be and hereby is entered in favor of the plaintiff and against defendant Jeanne Marie Dana in the amount of $1,451,951.30 in accordance with the jury's verdict and the Court's ruling on the plaintiff's Motion for Attorneys' Fees and Costs.

Dated at Bridgeport, Connecticut this 25th day of April, 1997.

KEVIN F. ROWE, Clerk

By: s/Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEMICAL BANK	:	
	:	
V.	:	CIV. No. 5:92CV341 (HBF)
	:	
MARIE DANA, ET AL	:	

RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

The issue before the Court is which party, Chemical Bank or the Bankruptcy Estate of Connaught Properties, Inc., has the superior claim to the proceeds from the sale of 26 Beach Avenue, Westport, Connecticut (the "Westport property"). Pending are cross motions for summary judgment. [Doc. ##343, 353].

BACKGROUND FACTS

1. On or about April 25, 1997, the Court, after a trial by jury, entered judgment against defendant Jeanne Marie Dana in the amount of $1,451,951.30. This judgment reflected Dana's liability on a personal guarantee of the debts of Streets Ahead, Inc., a corporation which Dana owned and controlled. [Doc. #344 ¶1].

2. The claim upon which this judgment was based arose in April 1990, when Chemical demanded payment from Dana pursuant to her guarantee. [Doc. #344 ¶2].

3. On June 11, 1992, Chemical Bank commenced this action against Jeanne Marie Dana.

The First Attachment

4. On June 30, 1992, after a hearing in which probable

cause was found to sustain Chemical's claims against Dana, the Court (Cabranes, D.J.) granted Chemical a prejudgment attachment on the Westport property (the "First Attachment",) in the amount of $862,161.25. [Doc. #344 ¶10].

5. During the attachment hearing, Judge Cabranes told Dana that "the order as entered by the Court . . . will have the effect of attaching the property in Westport, Connecticut ,..."[Doc. #344 ¶11].

6. The First Attachment was recorded on the Westport Land Records on July 1, 1992. [Doc. #344 ¶12].

7. On July 30, 1992, less than 30 days after the First Attachment was recorded, Dana conveyed the Westport Property to Connaught. [Doc. #344 ¶3, 13].

8. At the time of this transfer, the Westport property had a market value between $3.5 million and $5 million. [Doc. #344 ¶4].

9. There was no consideration paid by Connaught for the Westport property relative to the July 30, 1992 transfer. [Doc. #344 ¶5].

The Second Attachment

10. On August 12, 1994, the Court (Martinez, M.J.) issued an order allowing Chemical to attach Dana's interest in the Westport property in the amount of $976,043.80 (the "Second Attachment"). [Doc. #344 ¶17].

11. Chemical recorded evidence of its Second Attachment on the Westport Land Records on August 15, 1994. [Doc. #344 ¶18].

12. On September 12, 1994, Chemical Bank amended its complaint to add Connaught Properties, Inc. as a defendant. [Stip. at ¶3).

13. On September 23, 1994, Connaught filed for protection under 11 U.S.C. §301, and an order for relief under the United States Bankruptcy Code entered on that

date.[Doc. #355 ¶16].

14. Under an order dated October 26, 1994, the Connaught Bankruptcy Estate sold the Westport property for approximately $4,240,000. [Doc. #355 ¶20].

15. In November 1994, Chemical filed a proof of claim against the Connaught Bankruptcy Estate in the amount of $976,043.80. [Doc. #355 ¶24].

RULINGS OF THE COURT

The Westport property has been the subject of several rulings by the Court.

On February 25, 1994, Jeanne Marie Dana moved to dismiss the prejudgment remedy entered in June 1992. (Doc. #67). This motion was denied on June 24, 1994 (Eginton, D.J.). [Doc. #88). On July 19, 1994, Dana moved for reconsideration [Doc. #891, contending that the court overlooked her arguments pertaining to plaintiff's alleged failures to comply with the requirements of Conn. Gen. Stat. §§52-278j, 52-280 and 52-285. Dana argued that these failures rendered the First Attachment void. Upon reconsideration, on March 31, 1995, the Court (Eginton, D.J.) found that Dana had actual notice of the PJR attachment, that the order was filed on the Westport Land Records effectuating an attachment and that abode service of the attachment was made. Last, the Court found that Dana's argument of defective compliance under Conn. Gen. Stat. §52-285 was unavailing, stating

> In Milestan, the Court found that non-compliance with the requirements of §52-285 does not render the attachment invalid against the world; the attachment is voidable, rather than void, at the instance only of any other creditor or bona fide purchaser. Milestan at 470. Dana, the only party in this action attacking the validity of the attachment, is

neither a creditor nor a bona fide purchaser. [Doc. #167 at 3].

On January 5, 1996, this Court granted plaintiff's motion for summary judgment, dismissing Connaught Properties' third counterclaim which asserted that Connaught was at all relevant times the beneficial owner of the Westport property, and that Chemical's attachment of Dana's interest in the property was unenforceable. [Doc. #236]. The Court found the following undisputed facts.

1. On April 15, 1987, title to the Westport property was transferred from Centigon, Inc., a Connecticut corporation, to Jeanne Marie Dana, individually, and as trustee to Pilar Janine Dana, On April 15, 1987, Jeanne Marie Dana, individually and as trustee for Pilar Janine Dana, conveyed the Westport property to Connaught Properties, Inc. by quitclaim deed.
2. On April 29, 1992, in the action of Banque Paribas v. Dana, Civ. No. B-89-126 (JAC), then District Court Judge Cabranes found that,

> 20. Mrs. Dana owns and controls Connaught. Indeed, counsel for Connaught has stated that throughout this litigation that his client has acted exclusively through Mrs. Dana and that he has never had any substantive contact with any other officer or employee of Connaught. Connaught did not make a good faith effort to produce documents in its possession, custody or control.
>
> 21. Despite orders of the court to do so, defendants did not produce any evidence as to the creation, existence or maintenance of the trust for the benefit of Pilar Janine Dana, of which Mrs. Dana claims to be trustee. Defendants shall therefore be precluded from asserting the existence of such a trust as against plaintiff.
>
> 22. The Westport house is accordingly deemed

and declared to have been conveyed by Mrs. Dana to Connaught in her individual capacity as sole owner of the property (and not as trustee for any purported trust).

Judge Cabranes further held,

The court having made the foregoing findings of fact, it is hereby ORDERED, ADJUDGED AN DECREED that, pursuant to Fed. Rule Civ. P. 37 (b)(2)(C) and the inherent power of the court, the joint answer of defendants, Jeanne Marie Dana be and hereby is stricken; and it is further

ORDERED, ADJUDGED AND DECREED, that pursuant to Fed. Rule Civ. P. 37 (b) (2) (C) and the inherent power of this court, judgment on this Fourth claim of the complaint be entered forthwith in favor of plaintiff, Banque Paribas, setting aside and declaring null and void as to the parties to this action the purported April 15, 1987, conveyance by Jeanne Marie Dana individually, and as trustee for Pilar Janine Dana, to Connaught Properties, Inc. of the real property described in the quitclaim deed annexed hereto, which purported conveyance is recorded in the Land Records of the Town of Westport at Book 876 Page 071-72; and it is further

ORDERED, ADJUDGED AND DECREED that the title to the real property located at 26 Beachside Avenue in Westport, Connecticut, and more particularly described in the quitclaim deed annexed hereto, be and hereby is vested as between the parties to this action in Jeanne Marie Dana individually (and not as trustee of any purported trust); and it is further

ORDERED, ADJUDGED AND DECREED that the judgment entered in accordance with this Order relates back to the attachment on the real property located at 26 Beachside Avenue in Westport, Connecticut, and more particularly described in the attached quitclaim deed, dated March 16, 1989, and recorded in the Land Records of the Town of Westport at Book 966 Page 299, by virtue of a judgment against Mrs. Dana entered by this court dated November 21, 1990, which was reduced to a judgment lien dated January 17, 1991, filed within 4 months and recorded at Book 1086 Page 0119, which relates back to the attachment dated March 16 1989, and recorded at Book 966 Page 299; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant, Jeanne Marie Dana, a/k/a Jeanne Peters, a/k/a J. Martin Dana, a/k/a Patricia Delafield, and a/k/a Mrs. Ashton Sloane, shall execute and deliver to the Town Clerk of Westport, Connecticut, and any other appropriate party, any documents, including but not limited to deed, and shall do such other acts, as may reasonably be required to carry out and effectuate this Order and any judgment entered hereto.

3. On May 11, 1992, Connaught Properties, Inc. transferred by Quit Claim Deed "all right, title, interest, claim and demand whatsoever" in the Westport property to Jeanne Marie Dana "pursuant to a judgment entered by the clerk of the United States District Court, District of Connecticut, on April 29, 1992, in an action entitled Banque Paribas v. Jeanne Marie Dana, a/k/a Jeanne Peters, a/J. Martin Dana, a/k/a Patricia Delafield, a/k/a Ashton Sloane and Connaught Properties, Inc. Civil Action No. B-89-126

(JAC). This deed was recorded in the Westport Land records, on May 14, 1992, at Book 1157 Page 017.

4. On June 11, 1992, Chemical Bank filed this action against Jeanne Marie Dana, for money owed under her personal guarantee of the Streets Ahead loan.

5. At the hearing on Chemical's Application for Prejudgment Remedy, on June 30, 1992, Judge Cabranes stated,

> [Let] me try to state for Ms. Dana's benefit and for the record what I understand this matter may be about.
>
> In this action, the Plaintiff whom you represent, Chemical Bank, alleges that the defendant, Jeanne Marie Dana, personally guaranteed a loan of Streets Ahead, Inc., which we'll call "Streets," a corporation wholly owned by Mrs. Dana. Chemical advanced 570,000 Pounds Sterling to Streets to acquire certain real property in London, England.
>
> Because of a default in the payment of interest required under a promissory note, Chemical caused the entire amount due and proceeded under the laws of England to foreclose upon the London property. Chemical then sold the property. After crediting the proceeds of the sale of the property to the balance due under the note, the sum of $862,161.95 remains due to Chemical, according to Chemical's papers.

Judge Cabranes found probable cause to sustain the validity of plaintiff's claim, granted Chemical's Application for Prejudgment Remedy and ordered an attachment in the amount of $ 862,161.25 on the Westport property.

6. On July 17, 1992, in the Paribas action, Judge Cabranes "granted upon consent of the parties" Dana's Motion to Dissolve and Vacate the Injunction of June 11, 1992, "enjoining . . . Dana from selling, transferring, encumbering or otherwise in any manner, directly or indirectly, conveying or diverting real property owned by her at 26 Beachside" Avenue, Westport, Connecticut.

7. On July 30, 1992, Dana transferred, by quitclaim deed, all of her right, title and interest in the Westport property to Connaught.

8. On August 26, 1992, Connaught transferred, by quit claim deed, its right, title and interest to James A. Miller as Trustee.

9. On September 28, 1992, the parties in Paribas "stipulated, consented to and agreed that this Court's judgment dated April 29, 1992, striking defendants, answers and entering judgment on count IV of the complaint in favor of plaintiff, be, and it hereby is, vacated." Judge Cabranes endorsed the stipulation, "approved, upon consent of the parties."

In granting summary judgment, the Court held that there was "no basis for finding that Dana was not the owner of the Westport property at the time Judge Cabranes ordered the attachment in June, 1992." (Doc. #236 at 7].

UNDISPUTED FACTS

1. On June 11, 1992, Chemical Bank commenced this action against Jeanne Marie Dana.

2. On June 11, 1992, Judge Cabranes entered an injunction against Dana and on behalf of Banque Paribas enjoining Dana from transferring the Westport property without prior order of the Court. [Stip. ¶12]

Dana's Insolvency

3. On or about July 26, 1991, one year prior to her conveyance of the Westport property to Connaught, Dana executed, "under penalty of perjury," a bankruptcy petition which was filed in the United States Bankruptcy Court for the Southern District of New York. In that petition, Dana swore that she had $1,373,000 in assets and $4,577,408 in liabilities. (Doc. #344 ¶6].

4. Dana did not earn any income from any sources in either 1991 or 1992. [Doc. #344 ¶7].

5. At the time of her conveyance of the Westport property to Connaught, Dana was insolvent in that her liabilities exceeded her assets. [Doc. #344 ¶8].

6. Dana "owned and controlled Connaught" at all relevant times. [Doc. #344 ¶9].

Existence of Debt

7. At the PJR hearing on June 30, 1992, Chemical sought an PJR for interest which it represented to be accruing at the rate of $270 a day, or approximately $98,000 per year, on the Streets indebtedness of $862,161.95. Chemical sought an additional $250,000 in interest that it contended would accrue if the case remained pending for over two years. Judge Cabranes denied this request, stating "I am prepared to entertain an application for a modification upward of this order in due course, but I would think we would wait, at a minimum, for a month on that, and that we would do it on a month by month basis. And I'd be happy to do that. But I don't think we should take the extraordinary step of projecting forward a full year., (Pl. Ex. J at 15-17).

8. Dana transferred the Westport property to Connaught on July 30, 1992.

CHEMICALS MOTION FOR SUMMARY JUDGMENT

Chemical argues that Dana's conveyance of the Westport property in July 1992 was fraudulent as a matter of law and that summary judgment should enter in favor of Chemical on Count Two of its Third Amended Complaint.[1] Plaintiff further moves for summary judgment as to each of the claims asserted by the bankruptcy trustee for the estate of defendant Connaught Properties, Inc. in Adversary Proceeding No. 97-3056.

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[1] Count Two of the Third Amended Complaint states in relevant part that,

(17) On or about July 30, 1992, with knowledge of the attachment, Dana transferred all of her right, title and interest in the Connecticut premises to Connaught, a corporation owned and/or controlled by Dana

(18) On or about August 26, 1992, Connaught acting through Dana and with knowledge of the attachment, caused title to the Connecticut Premises to be transferred to Miller as Trustee, who currently holds title to the Connecticut Premises as Trustee.

(19) The transfers of the Connecticut Premises by Dana to Connaught, and by Connaught to Miller, were made under the direction or control of Dana and are fraudulent as to the plaintiff within the meaning of Connecticut General Statutes 52-552e as the plaintiff's claims against Dana arose before the transfers were made and the transfers were made with the actual intent to hinder, delay, or defraud creditors, including the plaintiff, in that among other indicia of a fraudulent conveyance:

a) the transfers were to an insider;

b) Dana retained possession or control of the Connecticut Premises after the transfers; c) the transfers were made with full knowledge of the plaintiff's lawsuit and attachment; d) upon information and belief, the transfers were of substantially all of Dana's assets; e) Dana removed or concealed assets; f) the value of the consideration received by Dana and Connaught was not reasonably equivalent to the value of the property transferred; g) upon information and belief, Dana was insolvent or became insolvent shortly after the transfers were made; h) the transfers occurred shortly after a substantial debt or lien was incurred.

I. COUNT TWO: FRAUDULENT CONVEYANCE

Chemical argues that it is undisputed that "Connaught acquired whatever interest it had in the Westport property by virtue of a fraudulent conveyance." [Doc. 351 at 5].

"A conveyance is fraudulent if made with actual intent to avoid any debt or duty or if made without any substantial consideration by a person who is or will be thereby rendered insolvent." Federal Deposit Ins. Corp. v. Isban, 870 F. Supp. 24, 28 (D. Conn. 1994) (quoting Molitor v. Molitor, 184 Conn. 530, 536 (1981)). "The party seeking to set aside a conveyance as fraudulent bears the burden of proving either (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his financial obligations; or (2) that the conveyance was made with a fraudulent intent in which the grantee participated." Tyers v. Coma, 214 Conn. 8, 11 (1990). "Thus, the plaintiff may succeed either by proving constructive fraud (i.e. a lack of substantial consideration and existing or resulting insolvency) or by proving actual fraud; the plaintiff need not satisfy both alternatives." In re Andersen, 166 B.R. 516, 524 (D. Conn. 1994). (internal quotation marks and citation omitted). "Under either alternative, the plaintiff bears the burden of proof." Id.

"A person is insolvent for these purposes when he is unable to pay his then-existing debts." Molitor, 184 Conn. at 536. However, "insolvency is not a necessary element of a fraudulent conveyance under Connecticut law if the second alternative is proved; rather, a conveyance is fraudulent if motivated by a desire to circumvent any debt or duty. Rocklen, Inc. v. Radulesco, 10 Conn. App. 271, 278 (1987); Tyers, 214 Conn. at 11.

The determination of whether a conveyance is fraudulent is a question of fact which must be proved by "clear, precise and unequivocal" evidence. Tyers, 214 Conn. at 11; Federal Deposit Insurance Com. v. Isban, 870 F. Supp. 24, 28 (D. Conn. 1994).

Constructive Fraud

> Connecticut General Statute §52-552f(a) provides A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . Without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . .

1. The claim arose before the transfer.

Chemical argues, and the Court agrees, that the record establishes that its claim against Dana clearly arose prior to the July 30, 1992 conveyance. First, Chemical made its initial demand for payment of the Street's debt in April 1990. [Pl. Ex. A]. Chemical filed the lawsuit on June 11, 1992. On June 30, 1992, the Court found probable cause to sustain a prejudgment attachment in the amount of $862,161.25 on the Westport property. (Pl. Ex. H). Dana transferred the Westport property to Connaught on July 30, 1992. [Pl. Ex. B]. Defendant offers no evidence to dispute this finding.

2. Dana did not receive reasonably equivalent value in exchange for her conveyance to Connaught

Chemical next argues that there is no material issue of fact that Dana did not receive reasonably equivalent value in exchange for her conveyance to Connaught. The record establishes the following. Both Dana and Connaught have admitted that there was no consideration paid for the Westport property when it was transferred on July 30, 1992.[2] Indeed, both Dana and Connaught admit that neither paid consideration for the property or conveyance taxes relative to

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[2] Pl. Ex. D, Connaught's Response No. 6 to Plaintiff's First Set of Interrogatories, dated August 21, 1995.

any of the transfers between them. The record further establishes that on April 15, 1987, Jeanne Marie Dana individually, and as trustee for Pilar Janine Dana transferred the Westport property to Connaught by quitclaim deed for no consideration. [Pl. Ex. C, No. 7, Pl. Ex. D, No. 6; Pl. Ex. F at 12-13]. On April 29, 1992, Judge Cabranes, in the Banque Paribas case, set aside and declared null and void the "purported" April 15, 1987 conveyance and ordered that the title in the Westport property be vested in Jeanne Marie Dana individually "and not as a trustee of any purported trust." [Pl. Ex. F. at 12]. Judge Cabranes found that,

> Mrs. Dana owns and controls Connaught. Indeed, counsel for Connaught has stated that throughout this litigation that his client has acted exclusively through Mrs. Dana and that he has never had any substantive contact with any other officer or employee of Connaught."]...
>
> Mrs. Dana and Connaught have conducted themselves throughout this litigation with a scornful disregard of the judicial process . . . The record of this case reveals nothing more nor less than that Mrs. Dana has evaded collection of a lawful debt in a manner indicating a contempt for the legal process and that her conduct compels, at long last, clear and effective court action to vindicate not only the interests of an aggrieved plaintiff but also the interests of the justice system itself. [Pl. Ex. F at 9-10, 11].

The Trustee argues that Dana "merely returned the property to the entity that had owned it for the previous five years" and that there was "no consideration for the July 31, 1992 [sic] transfer to Connaught because there had been no consideration for the April 29, 1992 transfer from Connaught to Dana." [Doc. #347 at 3-4], However, these statements

represent argument and not evidence and fail to address Judge Cabranes, ruling on this matter.

Although the Trustee argues that there is insufficient evidence to show that Dana did not receive reasonably equivalent value, he offers no evidence to support this argument. Under Connecticut law, [v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied..." Conn. Gen. Stat. §52-552d(a). "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors." Uniform Fraudulent Transfer Act §3 cmt. 2. Dana and Connaught's acknowledgment that no consideration was tendered is undisputed. Dana also admitted that the market value of the Westport property at the time of the transfer from Dana to Connaught was between $3,500,000 and $5,000,000.[3] [Pl. Ex. C No. 12]. Further, Dana transferred the Westport property within a month of the PJR attachment and after she was on notice by the Court that Chemical would seek an upward modification of the PJR attachment to secure the interest that was accruing. The Court concludes that the Trustee has not raised a material issue of fact on this element.

3. Dana was insolvent at the time or as a result of the transfer.

As evidence of insolvency, Chemical submits a copy of Dana's bankruptcy petition dated July 26, 1991, which states under penalty of perjury that she had $1,373,000 in assets and $4,577,408 in liabilities. (Pl. Ex. E]. Thus, in July 1991, Dana's liabilities exceeded her assets by $3,204,408. Chemical also appended Dana's sworn responses to interrogatories made in 1995, which state that she did not

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[3] The Westport property sold for $4,240,000 on October 26, 1994.

earn any income from any source in either 1991 or 1992. [Pl. Ex. C. No. 14]. See Conn. Gen. Stat. §52-552c(a) ("A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.").

The Trustee argues that Dana's bankruptcy petition does not establish Dana's insolvency on the date of the conveyance of the Westport property. (Doc. #347 at 5, subsection f]. However, Chemical has provided Dana's sworn interrogatory response in which she admits that her financial condition did not improve. The Trustee provides no evidence to create a disputed issue of fact on this claim.

Nevertheless, the Trustee contends that Chemical "has provided no evidence whatsoever for this Court to assess the likelihood that disputed claims are valid." (Doc. #347 at 4-5 subsection (a)]. Even if the Court disregards the schedule of disputed claims", Chemical argues that Dana's insolvency would not be affected because her liabilities would still exceed her assets by more than $2.3 million.[4]

The Trustee next argues that Dana's guaranties should not he included in the insolvency analysis to the extent that they are contingent liabilities "secured by property of a third person," rendering "it impossible to determine what amount, if any, of the debt should be included in the insolvency analysis." (Doc. 347 at 5 subsections (b) & (c)]. Again, even if the Court were to disregard the guaranties, as well as the disputed debts, Dana's liabilities would still exceed her

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[4] Chemical points out that "[a]ccording to her bankruptcy petition, Dana's liabilities exceeded her assets by $3,204,408. Only $838,957.75 in debts were listed by Dana as disputed. Subtracting the latter number from the former yields $2,365,450.30" (Doc. #358 at 5 n.2].

assets by $1,065,450.30.[5] Similarly, if the Court were to accept the Trustee's arguments as true and disregard the Penderyn debt listed as $150,000, and the Banque Paribas debt listed as $710,943.88 Dana's liabilities would still exceed her assets. [Doc. 347 at 5 subsection (d)].

The Trustee further challenges the bankruptcy petition, stating Chemical did not include the secured creditors of Dana. Since there is no evidence to show the collateral for these debts, the Trustee argues that the debt is not properly included in the insolvency analysis. However, the Trustee provides no evidence to support this contention. Hypothetical argument is insufficient to raise a material issue of fact. In sum, the Trustee fails to provide any evidence that Dana was not insolvent at the time of the transfer in July 1992.

Accordingly, summary judgment is GRANTED in favor of Chemical on Count Two of the Third Amended Complaint.

II. THE SECOND ATTACHMENT

Chemical next asserts that it is entitled to recover the PJR attachment in the amount of $976,043.80, by virtue of the fraudulent conveyance. Chemical argues that Dana had an interest in the Westport property for Chemical to attach on August 15, 1994, pursuant to Conn. Gen. Stat. §52-552h(a)(1). Moreover, Chemical contends that the second attachment cannot be a preference as a matter of law.

Remedies of Creditors-Conn. Gen. Stat. §52-552h(a)(1)

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[5] This is calculated by $3,204,408 less $1.3 million (guaranties) less 838,957.75 (disputed debts) equals $1,065,450. (Doc. #358 at 5].

Under Connecticut law, a creditor who prevails in a fraudulent conveyance action may avoid a transfer to the extent necessary to satisfy the creditor's claim. Conn. Gen. Stat. §52-552h (a) (1).[6] In other words, " [a] creditor may attach property which has been fraudulently conveyed by his debtor as though no conveyance had been made." Olin Corporation v. Castells, 180 Conn. 49, 52 (1980); Denison Dev. Co. v. Gunther, 189 Conn. 333, 334 (1983). Since the court finds that Dana's July 1992 conveyance of the Westport property to Connaught was fraudulently conveyed, Dana's conveyance is treated as thought it never occurred and Dana is held to have had an interest in the Westport property subject to attachment by Chemical on August 15, 1994. Murphy v. Dantowitz, 142 Conn. 320, 325-26 (1955) ("Property fraudulently conveyed may, as to the creditors of the grantor, be treated as if no conveyance of it had been made. . . .").

Accordingly, summary judgment is GRANTED in favor of Chemical's claim pursuant to Conn. Gen. Stat. §52-522h. Chemical is entitled to recover on its second PJR attachment in the amount of $976,043.80.

Preference Under 11 U.S.C. §547(b)

In opposition, the Trustee argues that Chemical's second attachment is subject to avoidance as a preference under

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[6] Section 52-552h, entitled "Remedies of Creditors", states in relevant part,

(a) In an action for relief against a transfer or obligation under sections 52-552a to 52-552l, inclusive, a creditor, subject to the limitations in section 52-552i, may obtain: (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim. . . .

Bankruptcy Code §547.[7]

Plaintiff first argues that section 547(b) is inapplicable because it applies only to transfers to creditors made on account of antecedent debts of the debtor. 11 U.S.C. §547(b)(2). Chemical points out that "the second attachment was not obtained on account of an antecedent debt of Connaught. It was obtained on account of an antecedent debt of Dana, over whose estate the Trustee has no control." [Doc. #345 at 22]. Further, the preference statute only applies to a "transfer of an interest of the debtor in property." 11 U.S.C. §547(b). Here, Chemical attached only Dana's interest in the Westport property and not any interest held by Connaught. See Pl. Ex. L (order of attachment "of all right, title and interest of said defendant Jeanne Marie Dana").

Under these facts, the Court agrees that Dana's transfer was not "to or for the benefit of a creditor" of this debtor/Connaught, nor was it "for or on account of an antecedent debt owed" by this debtor/Connaught. The Trustee cannot "avoid any transfer of an interest of

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[7] Section 547(b) states in relevant part:
the trustee may avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made--
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if--
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and such creditor received payment of such debt to the extent provided by the provisions of this title.

[Connaught] in, [the Westport] property" under these facts and in light of this Court's finding of constructive fraud and related finding under Conn. Gen. Stat. §52-522h treating Dana's transfer to Connaught on July 30, 1992 as though it never occurred. The Court finds that Dana held an interest in the Westport property subject to attachment by Chemical on August 15, 1994.

The Trustee has failed to prove the first two elements of an avoidable preference under section 547(b)(1) & (2). In re Chase & Sanborn Corp., 68 B.R. 530, 532 (Bankr. S.D. Fla. 1986), aff'd, 848 F.2d 1196 (11th Cir. 1988); see Matter of Evans Potato Co., Inc., 44 B.R.191, 193 (Bankr. S.D. Ohio 1984) (citing multiple cases for the proposition that "there can be no preference when there is no debtor-creditor relationship" under section 547(b)).

Importantly, the Trustee fails to address how it "may avoid an interest of the debtor [Connaught] in [the Westport] property" under section 547(b). The Court has considered the Trustee's other arguments under section 547(b) and finds them unavailing. The Court considers at all times that Chemical strenuously litigated its claim to the second PJR attachment under a theory of fraudulent transfer, specifically, Dana's fraudulent transfer of the Westport property to Connaught in July 1992. Chemical filed proper notice of the PJR attachment of Dana's interest on the Westport land records and by further commencing an action against Connaught for fraudulent conveyance.

Accordingly, summary judgment is DENIED on the Trustee's claim of preference under 11 U.S.C. §547(b).

Penderyn Mortgage

The Trustee next argues that Chemical's second attachment is junior to the Penderyn Mortgage. The facts, as alleged by the Trustee, are as follows. On July 18, 1994, James A. Miller, Trustee for Connaught, executed a

mortgage in favor of Penderyn, Ltd. to secure indebtedness of Connaught to Penderyn in the original amount of $380,000. The Trustee avoided the mortgage to Penderyn, pursuant to section 547(b). The Trustee contends that "[b]ecause the Penderyn mortgage is prior in time to Chemical's Second Attachment, the Trustee's rights as a mortgagee of 26 Beachside are senior to Chemical's rights via the Second Attachment." (Doc. #354 at 27].[8]

The Court declines to find that the trustee, after avoiding the mortgage under section 547(b), can now use the existence of that mortgage to benefit the Connaught Bankruptcy Estate. "Property fraudulently conveyed may, as to the creditors of the grantor, be treated as if no conveyance of it had been made." Murphy v. Dantowitz, 142 Conn. 320, 325-26 (1955). The recipient of property obtained by fraud "does not actually acquire title to it." In re North American Coin & Currency, Ltd., 767 F.2d 1573, 1576 (9th cir. 1985); In re Flight Transportation Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), cert. denied, 469 U.S. 1207 (1985) ("a Trustee in Bankruptcy can have no interest in property acquired by the fraud of a bankrupt, or anyone else, as against the claim of the rightful owner of such property."); In re Teltronics, Ltd., 649 P.2d 1236, 1239 (7th Cir. 1981); In re Paragon Securities Company, 589 F.2d 1240, 1242 (3d Cir. 1978); In re Tap, Inc., 52 B.R. 271, 279 (Bankr. D. Mass. 1985) ("Property obtained by fraud of the debtor or of another is not part of the debtor's estate."). "The principle underlying this rule is that the creditors should not benefit

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[8] The Court notes that the portion of the PJR attachment at issue here is the upward modification of $113,882.55 ordered by the Court (Martinez, M.J.) on August 12, 1994, representing accrued interest from June 30, 1992 on the first PJR attachment. This is calculated as follows, $976,043.80 (second attachment) less $862,161.25 (first attachment) equaling $113,882.55.

from fraud at the expense of those who have been defrauded." In re North American Coin & Currency, Ltd., 767 F.2d at 1576.

It follows then that, "the Trustee does not succeed to any greater interest than that held by the debtor. Where the debtor only holds legal title to the property and not an equitable interest, the property only becomes part of the estate to the extent of the legal title and the equitable interest not held by the debtor does not become part of the estate." In re Richardson, 75 B.R. 601, 603 (Bankr. C.D. Ill. 1987) (citations omitted); see Conn. Gen. Stat. §52-552h (a)(1); Olin Corp. v. Castells, 180 Conn. 49,52 (1980) ("A creditor may attach property which has been fraudulently conveyed by his debtor as though no conveyance had been made."); In re Anderson, 166 B.R. 516, 530 (Bankr. D. Conn. 1994) (holding "[a] creditor with a fraudulent conveyance claim may pursue only the specific property transferred or the proceeds thereof . . . [and] if successful, may void the transaction, which returns the fraudulently transferred property back to the [transferor], so that it is available to satisfy the creditor's claim."); Matter of Luftman, 245 F. Supp. 723, 725 (S.D.N.Y. 1965) ("A creditor may treat a fraudulent conveyance as if it had never been made and immediately attach or levy execution on the property conveyed.").

Chemical also argues, and the Court agrees, that at best, Connaught acquired only bare legal title to the Westport property with equitable ownership held in constructive trust for the benefit of Chemical. See Banister v. Solomon, 126 F.2d 740, 741 (2d Cir. 1942) (Judge Learned Hand expressing rule that property conveyed fraudulently by debtor results in constructive trust in favor or creditors); see Cohen v. Cohen, 182 Conn. 193, 203 (1980) ("a constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to

retain it."); Schmaling v. Schmaling, 48 Conn. App. 1, 18 (1998) ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.") (quoting Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378 (1919) (Cardozo, J); see also Zack v. Guzauskas, 171 Conn. 98, 103 (1976) (a constructive trust arises . . . against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy."); In re K Chemical Corp., 188 B.R. 89, 98 (Bankr. D. Conn. 1995) (same). The Court finds that the imposition of a constructive trust for the benefit of Chemical is warranted in this case.

A constructive trust, confers on the beneficiary of the property an equitable interest in the property superior to that of the bankruptcy trustee. In re Korea, Controle et Revision S.A., 961 F.2d 341, 352 (2d Cir. 1992); In re Howard's Appliance Corp., 874 F.2d 88, 93 (2d Cir. 1989) (same); In re K Chemical Corp., 188 B.R. 89, 97 (Bankr. D. Conn. 1995) (same). Thus, Chemical's interest in the Westport property is superior to the Trustee's. In re Kornblum & Co., Inc., 81 F.3d 280, 284 (2d Cir. 1996) (trust beneficiary "entitled to claim trust property ahead of even creditors holding security interests in the property."); see also 11 U.S.C. §541(d) (Property in which the debtor holds . . only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."); United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.

10 (1983) (Bankruptcy code "plainly exclude[s from the bankruptcy estate] property of others held by the debtor in trust at the time of the filing of the [bankruptcy] petition."); In re Howard's Appliance Corp., 874 F.2d 88, 93 (2d Cir. 1989) (property held by debtor in a constructive trust excluded from bankruptcy estate).

The Court's decision is based on equitable considerations, its finding of constructive fraud, and its holding under Conn. Gen. Stat. §52-522h. The Trustee's citation to In the Matter of Hulk, 8 B.R. 444 (Bankr. D. Conn. 1981) is not controlling and is distinguishable under these facts.

Accordingly, summary judgment is DENIED on the Trustee's claim that Chemical's second attachment is junior to the Trustee's Penderyn Mortgage.

TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

I THE FIRST ATTACHMENT

In seeking to determine the priority of recovery for Chemical Bank and Connaught's other creditors from sale proceeds of the Westport property,[9] the Trustee asserts that

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[9] By order dated October 26, 1994, the Connaught Bankruptcy Estate sold the Westport property for approximately $4,240,000. (Miller Aff., Doc. #357 ¶6]. The Trustee states that "the Bankruptcy Estate has satisfied all valid encumbrances senior in right to the First Attachment." (Doc. #354 at 9]. As of May 28, 1998, the Bankruptcy estate retained approximately $1,147,330.99 of the proceeds of sale. (Doc. #357 ¶7]. These proceeds, plus the accrued interest, represent the sole asset of the Bankruptcy Estate. Id. 18.

As a preliminary matter, the Trustee contends that as of the bankruptcy petition date, September 23, 1994, it placed a "duly perfected judgment lien on all of Connaught's interest in 26 Beachside" to secure the claims of Connaught's creditors, pursuant to the powers enumerated in 11 U.S.C. §544. He further asserts that the "rights of Connaught's

Chemical's first PJR attachment of June 30, 1992, fails to "strictly comply" with the requirements set forth in Conn. Gen. Stat. §52-285. In support, he argues, "a sheriff did not file a certificate of attachment." (Doc. #354 at 20]. Rather, "Chemical recorded the order Granting Prejudgment Remedy." Id. The Order provided, "ORDERED that the plaintiff [sic] may attach to the sum of $862,161.25 the real estate standing in the name of the defendant Jeanne Marie Dana." Id. The Trustee argues that the "[r]ecording of the notice that Chemical may attach the property . . . is not an attachment." Id. He asserts that the sheriff "did not complete a certificate stating that he attached the property, he never signed any document filed in the land records . . . and he never stated the amount of damages sought by Chemical in this action."Id. at 20-21.

As set forth earlier in this opinion, there have been several prior challenges to the first attachment. Chemical argues, and the Court agrees, that this issue was specifically addressed by Judge Eginton earlier in this litigation and should not be relitigated now under the law of the case doctrine. Remington Products, Inc. v. North America Philip , Corp., 755 F. Supp. 52, 54 (D. Conn. 1991).

> Judge Eginton's opinion states
> The court also finds defendant Dana's argument of defective compliance with Conn. Gen. Stat. §52-285 unavailing given the holding in Milestan v. Tisi, 140 Conn. 464 (1985). In Milestan, the court found that non-compliance with the requirements of

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creditors to seek recovery from 26 Beachside do not change if 26 Beachside was fraudulently conveyed, or conveyed to an "alter ego" or an "instrumentality."" [Doc. #354 at 13]. The Court understands the Trustee to mean recovery from the proceeds of sale from 26 Beachside. Chemical does not challenge these contentions.

> §52-285 does not render the attachment invalid against the world: the attachment is voidable, rather than void, at the instance only of any other creditor or bona fide purchaser. Milestan at 470. Dana the only party to this action attacking the validity of the attachment, is neither a creditor nor a bona fide purchaser.

Doc. #167 at 3. Nevertheless, the Trustee contends that Judge Eginton "did not explicitly, or by necessary implication, determine that a creditor or bona fide purchaser . . . could not prevail against Chemical's attachment."[10] (Doc. #347 at 12]. The Court disagrees. A fair reading of Judge Eginton's opinion reveals that, notwithstanding the fact that Dana was "not a creditor nor a bona fide purchaser" her argument was nevertheless unavailing. The Court declines to exercise further review of Judge Eginton's opinion. The Trustee presents no circumstances to warrant reconsideration of this issue de novo. Remington, 755 F. Supp. at 54 ("any of three circumstances may justify reconsideration of an earlier decision in the case: 1) an intervening change in controlling law; 2) new evidence; or 3) the need to correct a clear error of law or to prevent manifest injustice.") (citations omitted).

Accordingly, summary judgment is DENIED on the Trustee's challenge to Chemical's first attachment pursuant to Conn. Gen. Stat. §52-285.

CONCLUSION

For the reasons stated, Chemical's Motion for Summary

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[10] The Trustee fails to address Milestan v. Tisi relied on by Judge Eginton.

Judgment (Doc. #343] is GRANTED and the Trustee's Motion for Summary Judgment [Doc. #353] is DENIED.

SO ORDERED at Bridgeport this 31st day of March 1999.

HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

August 3, 2001

Ms. Jeanne Marie Dana
P.O. Box 1767
New York, New York 10150

Re: Jeanne Marie Dana
v. Chemical Bank
Application No. 01A101

Dear Ms. Dana:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsberg, who on August 3, 2001, extended the time to and including October 11, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By s/ Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

October 15, 2001

Ms. Jeanne Marie Dana
P.O. Box 1767
New York, New York 10150

Re: Dana v. Chemical Bank

Dear Ms. Dana:

Returned are 9 copies of the petition for writ of certiorari in the above-entitled case postmarked on October 11, 2001 and received on October 12, 2001, which fails to comply with the Rules of this Court.

If you intend to pay the $300 docket fee, the petition must be in booklet format and on paper that measures 6 1/8 by 9 1/4 inches. Rule 33.1(a).

The text of the document must appear on both sides of the pages. Rule 33.1(b).

The order(s) of the United States District Court for the District of Connecticut must be included in the appendix. Rule 14.1 (i). Each order must be reproduced so that it complies with Rule 33.1.

The order denying rehearing must be included in the appendix as required by Rule 14.1(i)(iii).

This Office shall retain one copy of the petition and your check in the amount of $300.00 in expectation of timely

receipt of a properly prepared petition.

Enclosed are a copy of the Rules of the Court and memorandum concerning the preparation of a paid petition in booklet format.

Sincerely,

William K. Suter, Clerk

By:

M. Blalock,
(202) 479-3023

Enclosures

cc: Steven M. Frederick
Timothy D. Miltenberger

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

(2)

No. 01-991

In The

Supreme Court of the United States

JEANNE MARIE DANA,

Petitioner,

v.

CHEMICAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Respondent, Chemical Bank, hereby states that it is now known as J.P. Morgan Chase Bank, whose parent company is J.P. Morgan Chase & Co. Other than J.P. Morgan Chase & Co., there are no parent, subsidiary, or affiliates of Chemical Bank which have issued shares to the public.

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COUNTER-STATEMENT OF THE CASE

Preliminary Statement

This petition challenges two distinct appeals to the United States Court of Appeals for the Second Circuit. The first concerns the Second Circuit's affirmance of a summary judgment which was entered in favor of the Respondent against a party *other* than the Petitioner; the second concerns the Second Circuit's affirmance of a judgment entered in favor of the Respondent against the Petitioner after a jury trial. As outlined below, the Petitioner's arguments should be rejected because she lacks standing to challenge a judgment which was not entered against her, and because the Second Circuit's decisions were otherwise in accordance with well-settled law. Moreover, the Petitioner has failed to set forth any compelling reason why this Court should exercise its discretion to review the challenged decisions of the Second Circuit. Accordingly, the Respondent respectfully submits that the petition should be denied.

The Claim Against Dana

This action arises out of the failure of Petitioner Jeanne Marie Dana ("Dana") to honor the absolute and unconditional guarantee which she executed in favor of Respondent Chemical Bank ("Chemical"). At trial, Dana attempted to convince the jury that she should not be bound by her guaranty because (she claimed) Chemical's employees were incompetent and somehow misled her into believing that the guaranty which she voluntarily executed should not be honored in accordance with its

terms. Fortunately, the jury saw through Dana's contrived and unsupportable fable and soundly rejected it.

On appeal, Dana did not argue that the jury's findings were unsupported by the evidence. Instead, Dana shifted her focus to the conduct of the trial judge, whom she claimed deprived her of a fair trial. Specifically, Dana argued, as she does here, that the trial judge exhibited bias by asking her questions on the witness stand. The Second Circuit Court of Appeals appropriately rejected Dana's argument on the grounds that no bias was shown and that the judge gave the jury a curative instruction which was substantially similar to the one Dana's counsel requested, which instruction was "more than sufficient to overcome any potential prejudice." (*See* Petition for Writ of Certiorari ("Pet.") at 20a.)

Notwithstanding the fact that Dana's claim of trial error is neither "compelling" nor has any impact outside of this particular case, Dana seeks further review by this Court. For the reasons set forth below, Dana's petition for a writ of certiorari should be denied.

The Claim Against Connaught

At the time the action against Dana on her guaranty was commenced in June 1992, Dana's principal asset was valuable waterfront property located in Westport, Connecticut (the "Westport Property"). On July 30, 1992, Dana fraudulently conveyed the Westport Property, worth millions of dollars, to defendant Connaught Properties, Inc. ("Connaught") – a corporation which she owned and controlled. The purpose of Dana's fraudulent conveyance of her principal asset to her own corporation

was to defraud Chemical, which was her principal creditor.

On or about September 13, 1994, Chemical sought leave to amend its complaint in order to assert a fraudulent conveyance count against Connaught. On September 23, 1994, Connaught filed for protection under the United States Bankruptcy Code. Due to Connaught's bankruptcy filing, Trustee Richard Coan ("Trustee" or "Trustee Coan") was appointed by the Bankruptcy Court to protect the interests of the creditors of Connaught in this litigation.

For various reasons, none of which are relevant to Dana's petition, the district court severed the action so that the trial proceeded solely against Dana on her guaranty. The remaining portion of the case, which pertained to Connaught and Chemical's fraudulent conveyance claims, was submitted to the court by virtue of cross motions for summary judgment which were filed by Chemical, and by Trustee Coan on behalf of Connaught. Dana was not a party to the summary judgment proceedings.

The district court granted Chemical's motion for summary judgment. The court found a fraudulent conveyance and imposed a constructive trust against Connaught in favor of Chemical. On appeal to the Second Circuit, Trustee Coan challenged the imposition and effect of the constructive trust, but did not challenge the court's finding of fraudulent conveyance. Dana was not a party to that appeal.

The Second Circuit rejected Trustee Coan's arguments. The Second Circuit's ruling is well supported by

Connecticut and federal law. In an apparent concession to the validity of the Second Circuit's analysis and conclusions, Trustee Coan has elected not to petition this Court for certiorari.

Since Dana was not a party to the Connaught summary judgment proceedings or the Second Circuit appeal arising therefrom, she lacks standing to petition this Court for plenary review. Even if she had such standing, however, her petition should still be denied because the district court's decision and the Second Circuit's affirmance of that decision was correct.

REASONS FOR DENYING THE PETITION

I.

DANA LACKS STANDING TO CHALLENGE THE SECOND CIRCUIT'S CONSTRUCTIVE TRUST DETERMINATION

Dana's challenge to the Second Circuit's affirmance of the district court's imposition of a constructive trust should summarily be rejected because Dana lacks standing to raise it. As the Second Circuit's Summary Order makes clear, the issue of the district court's imposition of a constructive trust was litigated by and between appellant Richard Coan, as trustee of Connaught's bankruptcy estate, and Chemical Bank. The appeal on the constructive trust issue arose out of the district court's action in granting Chemical's motion for summary judgment against Trustee Coan. Dana was not a party to the motion for summary judgment, nor was she a party to Trustee Coan's appeal to the Second Circuit. The Second Circuit

explained the procedural history of this complicated matter as follows:

> The District Court severed the trial, which then proceeded against Dana alone [relating to her liability under the guaranty]. The remaining action *against Coan* [relating to the constructive trust] was resolved by the District court's order granting Chemical's motion for summary judgment as to the fraudulent conveyance claim, granting its motion to recover on its second attachment, and denying Coan's cross-motion in opposition.

(Pet. at 3a) (emphasis added).

Since no judgment relating to the fraudulent conveyance count was entered against Dana, she has no standing to petition this Court for certiorari. *See Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947) ("Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ [of certiorari] is dismissed as to Penfield."); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (stating that a party invoking federal court's decisional and remedial powers "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Dana's lack of standing is fatal to her petition.

II.

THE SECOND CIRCUIT'S CONCLUSION THAT CHEMICAL, AS BENEFICIARY OF A CONSTRUCTIVE TRUST, TAKES PRIORITY OVER THE TRUSTEE IS CONSISTENT WITH THE BANKRUPTCY CODE

A. The Bankruptcy Code Does Not Permit the Trustee to Exert Control Over Property Which is Not Part of the Bankruptcy Estate

The Trustee's inability to utilize his strong-arm powers to deprive Chemical of its rights under the constructive trust theory stems from the fact that the Trustee cannot exert control over property which is not part of Connaught's bankruptcy estate. Section 541(d) of the Bankruptcy Code excludes various equitable interests from the bankruptcy estate. That section provides, in relevant part, that:

> [Property] in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

Nowhere in the statute is there any support for the proposition that section 541(d) excludes some equitable interests, but not others. To the contrary, as pointed out in *In re Dameron*, 206 B.R. 394 (Bankr. E.D. Va. 1997), "it has been held that the legislative history of the section indicates that Congress 'clearly intended the exclusion created by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust.' "

Id. at 400 (*quoting Official Comm. of Unsecured Creditors v. Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1059 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)); *see also Mitsui Mfrs. Bank v. Unicom Computer Corp.*, 13 F.3d 321, 324 (9th Cir. 1994); *In re Mid-Atlantic Supply Co.*, 790 F.2d 1121, 1124-25 (4th Cir. 1986).

This Court has previously acknowledged that Section 541(d) establishes that the Code will not ratably distribute among a debtor's creditors property that belongs to third parties. *See Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962) (stating that the law "does not authorize a trustee to distribute other people's property among a bankrupt's creditors"); *see also In re Atlantic Mortgage Corp.*, 69 B.R. 321, 330 (Bankr. E.D. Mich. 1987) (holding that the rights of constructive trust beneficiary are superior to trustee's because "Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own") (citations and internal quotation marks omitted).

As discussed below, Connaught did not hold equitable title to the Westport Property. Accordingly, it could not be deemed property of Connaught's bankruptcy estate, as the Second Circuit properly found.

B. The Second Circuit's Decision is Well-Supported

From reading Dana's brief, one might be left with the impression that the Second Circuit's subordination of the Trustee's interests to those of Chemical, as beneficiary of a constructive trust, is novel. To the contrary, the Second

Circuit's decision is not only supported by its longstanding precedents, but also by numerous other courts, at all levels, throughout the country. *See, e.g., In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 352 (2d Cir. 1992) (holding that a constructive trust "confers on the true owner of the property an equitable interest in the property superior to the trustee's") (citations and internal quotation marks omitted); *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989) (same); *In the Matter of Quality Holstein Leasing*, 752 F.2d 1009, 1015 (5th Cir. 1985) ("In summary, we find that the courts below erred in concluding that section 544 empowers a bankruptcy trustee to retain for the benefit of the estate property that the debtor obtained by fraud and upon which state law has imposed a valid constructive trust."); *In re Moravia Surplus & Supplies, Inc.*, No. 95-CV-1281, 1997 WL 538900, at *2 (N.D.N.Y. August 28, 1997) (stating that imposition of constructive trust confers on beneficiary equitable interest which is superior to bankruptcy trustee) (Pooler, J.); *In re K Chemical Corp.*, 188 B.R. 89, 97 (Bankr. D. Conn. 1995) ("[A] constructive trust thereby confers on its beneficiary an equitable interest in the trust res which is superior to that of a bankruptcy trustee.") *aff'd*, No. 3:95CV2681 (EBB), 1999 WL 464531 (D. Conn. 1999); *In re Atlantic Mortgage Corp.*, 69 B.R. at 330 ("As a general rule, it must be held that section 541(d) prevails over the trustee's strong-arm powers.") (citations and internal quotation marks omitted); *In the Matter of Triple A Coal Co.*, 55 B.R. 806, 813 (Bankr. S.D. Ohio 1985) ("Under the [constructive trust] theory, the money never becomes part of the bankruptcy estate. The beneficiary's equitable right

to it under 11 U.S.C. § 541(d) prevails over the bankruptcy trustee's strong-arm powers under 11 U.S.C. § 544, since the trustee holds only legal title to the money."); *In re Vermont Real Estate Inv. Trust*, 25 B.R. 813, 816 (Bankr. D. Vt. 1982) (where constructive trust prevails, "funds provided by the Plaintiff should be returned rather than be included in the Debtor's estate under Section 541 of the Code"); *In Matter of Faber's, Inc.*, 360 F. Supp. 946, 947 (D. Conn. 1973) ("Imposition of such a [constructive] trust would mean that the [assets at issue] would be excluded from the bankrupt's estate.").

While Dana attacks the Second Circuit's decision on the grounds that its interpretation of Connecticut state law may be at odds with certain other states, the law is clear that the Bankruptcy Code specifically contemplates the lack of uniformity among the states when dealing with bankruptcy issues. As this Court previously has acknowledged:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, *priorities of payment and the like*. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the states.

Butner v. United States, 440 U.S. 48, 54 n.9 (1979) (*quoting Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)) (emphasis added; internal quotation marks omitted).

C. Dana Overstates the Conflict Between the Second Circuit's Decision and the Decision of the Sixth Circuit in *In re Omegas Group*

Dana's claim that a conflict between the Circuits exists is predicated primarily on the Sixth Circuit's decision in *In re Omegas Group, Inc.*, 16 F.3d 1443 (6th Cir. 1994). Dana's argument, however, overstates the significance of the *Omegas* decision. While clearly the *Omegas* court disfavored the use of constructive trusts to elevate the interests of constructive trust beneficiaries over the bankruptcy trustee, the Sixth Circuit's decision was based, at least in part, on the fact that Kentucky law, which it was obligated to apply, did not support imposition of a constructive trust under the facts of that case because of the nature of the business relationship of the parties and because the creditor seeking imposition of a constructive trust came to the court with unclean hands. *Id.* at 1451.

Furthermore, the *Omegas* case is distinguishable because, as recognized in the concurring opinion, the case should have been decided solely on the grounds that, under Kentucky law, "a constructive trust only comes into being at the time of its judicial creation." *Id.* at 1455.[1]

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[1] The Supreme Court has made clear that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner*, 440 U.S. at 54.

Since there was no judicial creation of a constructive trust until after the debtor's bankruptcy filing, Judge Guy would have reversed the trial court without opining as to whether a trustee's strong-arm powers elevate a bankruptcy estate's interests in property over the interests of a constructive trust beneficiary.

In contrast, under applicable Connecticut law, "[p]roperty fraudulently conveyed may, as to the creditors of the grantor, be treated as if no conveyance of it had been made." *Murphy v. Dantowitz*, 142 Conn. 320, 325-326, 114 A.2d 194 (1955), *overruled on other grounds, Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 54, 459 A.2d 503, 507 (1983). There is no dispute that Dana's conveyance of the Westport Property to Connaught occurred prior to the time that Connaught filed its bankruptcy petition. If that conveyance were deemed never to have been made, the property never could have become part of Connaught's bankruptcy estate.

Dana's criticism of the Second Circuit's application of Connecticut law with respect to the "retroactive" effect of constructive trusts is misplaced, as Connecticut seems to have adopted the majority view on the issue. *See In re Dameron*, 206 B.R. at 399 ("Actually, the [Sixth Circuit's finding in *Omegas]* of when a constructive trust arises under common law is the minority view under a split of authority on the issue."); *see also Curtis Mfg. Co. v. Plasti-Clip Corp.*, 933 F. Supp. 94, 106 (D. N.H. 1995) ("[A] constructive trust arises at the time of the occurrence of the events giving rise to the duty to reconvey the property.") (citations and internal quotations omitted); *In re Atlantic Mortgage Corp.*, 69 B.R. at 328, 330 (same); *Cap.*

Investors Co. v. Ex. of Morrison's Est., 800 F.2d 424, 427 n.5 (4th Cir. 1986) (same).

Dana's bald and unsubstantiated claim that the Second Circuit's reasoning has been "questioned" by the Seventh Circuit in *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989), must also be rejected. Contrary to Dana's argument, the decision in *Plunkett* actually supports the Second Circuit's holding. In that case, the Seventh Circuit held that the trustee was entitled to recover for the estate certain partnership interests that were held in constructive trust for various defrauded partners. In so holding, the court acknowledged that "[s]ections 544(a)(1) and (2) follow state law . . . in giving the trustee no *greater* rights than the judgment creditor would have. *Id.* at 515 (emphasis in original). The *Plunkett* court found, however, that the trustee had priority over the partnership interests because, under state law, a bona fide purchaser (such as the trustee) would have taken priority over the partners where, as in that case, the partners "neglected to record" their partnership interests. *Id.* In the present case, Connecticut law afforded Chemical priority over the Trustee as beneficiary of a constructive trust and there is no indication that the Seventh Circuit would not have reached the same result. Since this issue turns, in any event, on the interpretation of state law, there is no issue appropriate for resolution by this Court.

III.

THE TRIAL COURT'S QUESTIONING OF DANA WAS APPROPRIATE AND DID NOT CAUSE DANA ANY PREJUDICE

A. No Compelling Reason Exists for Granting Dana's Petition With Respect to her Claim of Trial Error

Rule 10 of the Rules of the Supreme Court of the United States makes clear that: "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Moreover, Justice Stevens has pointed out that the Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J. concurring).

In her petition, Dana contends that the district court, by inquiring of her on the witness stand, committed error. The Second Circuit Court of Appeals disagreed, and now Dana would have the Supreme Court of the United States consider this argument yet again – notwithstanding the fact that it has no consequence to any case other than her own. Because this Court's certiorari jurisdiction is not intended to encompass the mere correction of errors in particular cases, Dana's petition should be denied.

B. Dana Was Not Prejudiced as a Result of the Trial Court's Conduct

The questioning of Dana by the trial judge occurred on the last day of evidence. While Dana's counsel did assert an objection to the court's questioning, he never

requested that the court grant a mistrial, nor did he request an instruction that the court's line of questioning be disregarded. Rather, Dana's counsel requested only that the court instruct the jury that "this court has no interest in one side or the other, has no opinion and does not know anything and, clearly asked questions to try to assist the Jury." (Tr. p. 1151; A-462.)[2] In response to concerns raised by Dana's counsel, the district court assured both parties that she had "no opinion as to the merits of the case" and was propounding questions simply to assist the jury in "ascertaining what the facts are." (Tr. p. 1163; A-465.) Nevertheless, the court instructed both parties that they were free to object to her questions, and advised Dana's counsel that the court "would be happy to consider any charge that [counsel] would like to propose." (Tr. pp. 1152, 1163-1164; A-463, 465-66.)

Ultimately, the trial court charged the jury in accordance with Dana's wishes. Specifically, the court made clear that its questions were not meant to indicate any opinion about the weight or effect of testimony or evidence, and that the jury should disregard the number of questions which it asked or the fact that it did not ask questions of some witnesses. (Tr. pp. 1366-1369; A-517.) As the Second Circuit appropriately concluded, this charge was "more than sufficient to overcome any potential prejudice" to Dana. (*See* Pet. at 20a (*citing United States v. Vega*, 589 F.2d 1147, 1153 (2d Cir. 1978); *United States v. Berardelli*, 565 F.2d 24, 30 (2d Cir. 1977), *rejected on other grounds by United States v. Apfelbaum*, 445 U.S. 115

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[2] Citations are to the Appendix submitted to the United States Court of Appeals for the Second Circuit.

(1980); *United States v. Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975)).

C. Dana Failed to Preserve Her Claim of Error

As noted above, Dana's counsel, in response to the trial court's questioning of Dana, requested only that the court instruct the jury that "this court has no interest in one side or the other, has no opinion and does not know anything and, clearly asked questions to try to assist the Jury." (Tr. p. 1151; A-462.) The court accommodated this request and incorporated it into its charge to the jury. Dana's counsel failed to object to the trial court's charge. Dana's failure to object to the court's jury charge precludes her from claiming prejudice on appeal. *See* Fed. R. Civ. P. 51 ("[N]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *see also Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992) (failure to object to a jury instruction at trial waives consideration of claims relating to that charge on appeal). Dana's failure to object to the district court's charge, standing alone, is sufficient to deny her petition for further appellate review.

D. The Court's Questioning of Dana Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

In asserting her argument that the trial court departed from the accepted and usual course of judicial

proceedings by questioning her on the witness stand, Dana conveniently ignores Rule 614 of the Federal Rules of Evidence. That rule provides, in relevant part, that the "court may interrogate witnesses, whether called by itself or by a party." Fed. R. Evid. 614; *see Vega*, 589 F.2d at 1153 (holding that limited interrogation of witnesses by trial court is "entirely appropriate" and "specifically approved by the Federal Rules of Evidence") (citations omitted); *United States v. Williams*, 575 F.2d 388, 392 (2d Cir.) ("[W]e have recognized that a trial judge had the authority to put inquiries where it is 'necessary to clarify testimony and assist the jury in understanding the evidence.' ") (citations omitted), *cert. denied*, 439 U.S. 842 (1978). Not only has Dana failed to demonstrate that the district court's questioning was inappropriate in any respect, but she has fallen far short of meeting her burden of justifying further review of this issue by this Court.

CONCLUSION

Certiorari is not warranted because Dana has failed to establish compelling reasons why this Court should accept this case for plenary review. Even if Dana had standing to raise her arguments, they amount to nothing more than a duplicative attempt to re-litigate an action which has already consumed far more judicial resources than have ever been warranted.

Accordingly, Dana's petition for a writ of certiorari should be denied.

Respectfully submitted,

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